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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 130.

STEFANO SANGUINETTI, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 2, 1922.

(29,184)



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In the Court of Claims.

No 32914.

STEFANO SANGUINETTI

vs.

THE UNITED STATES.

I. PETITION.

[Filed August 18, 1914.]

Petition.

To the Honorable Chief Justice and Judges of the Court of Claims:

Your petitioner respectively shows unto your Honors the following facts:

I.

Petitioner is a citizen of the United States and of the State of California.

II.

The Calaveras River rises in the foothills of the mountains to the northeast of the city of Stockton, California, and, flowing in a direction generally southwest, empties into the San Joaquin

River slightly to the northwest of said city. The Mormon Slough also rises in the foothills of the mountains to the east of Stockton, south of the source of the Calaveras River, and, flowing in a direction generally west, through the city of Stockton, empties into what is known as the Stockton Channel of the San Joaquin River on the western edge of the city of Stockton.

III.

Both the Calaveras River and the Mormon Slough have always been subject to flood stages from the rains and melting snows in the mountains, and the effect of said flood waters was to inundate, or subject to inundation, annually, a portion of the city of Stockton with the waters of Mormon Slough, but the lands hereinafter described were never submerged nor subjected to submergence by said water-courses in the flood stages.

IV.

For the purpose of relieving the city of Stockton from the conditions described by the last preceding paragraph, Congress, by the

Rivers and Harbor appropriation act approved June 13, 1902, provided as follows:

"For the rectification of the Stockton and Mormon channels at and near the city of Stockton, California, by the construction of a canal to divert the waters of the Mormon channel into Calaveras River in accordance with the report submitted in House Document numbered 152; Fifty-fifth Congress, third session, fifty thousand dollars; Provided that a contract or contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete said project not to exceed in the aggregate \$175,000 exclusive of the amounts herein and heretofore appropriated. Provided Further, that the City of Stockton, or the State of California shall first furnish to the United States the right of way for said canal."

32 Stats., Part 1, p. 358.

V.

Subsequently thereto, the rights of way having been procured as provided in said act, the Government of the United States began the construction of the canal therein provided for, and later acts of Congress making additional appropriations, the same was completed about 1910 and the channels of the Mormon Slough and the Calaveras River were connected, the course of the canal being southeasterly to northwesterly. Said canal would not have been constructed but for the taking over of the project by the United States.

VI.

Said canal, however, proved to be insufficient to take care of the floods waters of the Mormon Slough and in the spring of 1911 the rains and melting snows from the mountains and hills came down through Mormon Slough and were diverted into and through said canal in such volume and force that the same overflowed and the adjacent lands were submerged for a considerable distance on the north and east of said canal, while the force of the current was such that it broke through the levee on the opposite bank of the Calaveras River (the channel of which was itself insufficient to carry off its own waters and the added waters of said Mormon Slough) and flooded a very considerable area to the north and west of said river. All of said lands were in a high state of cultivation and very valuable.

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VII.

The result of said overflow, which has since been recurrent, has been to destroy the growing crops and cover portions of the overflowed region with said gravel, noxious weeds and other obstructions to cultivation; on other portions to wash away the topsoil completely down to bedrock, rendering the same unfit for cultivation; to demolish and injure the fences, buildings, fruit trees and vines and other improvements and, generally, to do the damage that would

naturally ensue upon floods of volume and violence. Beside the direct damage done by the flood of 1911 and subsequent recurrences, the danger and probability of future recurrences of floods have so diminished the value of the lands subject to overflow that they are now worth but a fraction of their former value. Some of the lands when overflowed must be pumped out at great expense and the protective works rebuilt.

VIII.

Some of the land within the overflowed area was in the possession of the owners thereof, who were cultivating the same or using it for the other purposes for which it was susceptible, while other portions of said land were leased to tenants, who were cultivating it on shares or leasing for a money rental.

IX.

The effect of said construction work by the United States was, and has been, to take the property of the owners and tenants of land within said flooded area, including petitioner, by reason of which petitioner has been damaged in the sum shown by his bill of particulars hereunto annexed, for which amount petitioner prays judgment against the United States, no part of the same having been paid, and petitioner's rights thereto not having been sold or assigned. Stefano Sanguinetti, By Benj. Carter, His Attorney in Fact. F. Carter Pope, Of Counsel.

DISTRICT OF COLUMBIA, ss:

Before me, Francis L. Neubeck, a Notary Public in and for said District, Benjamin Carter, whose name is signed to the foregoing petition as Attorney in Fact for the petitioner therein named, made oath on this, the 12th day of August, 1914, that the allegations of said petition are true to the best of his knowledge, information and belief. Benj. Carter.

Sworn to and subscribed before me the day above written. Francis L. Neubeck, Notary Public, District of Columbia.

In the Court of Claims.

BILL OF PARTICULARS.

The United States to Stefano Sanguinetti, Dr.

To value of 40 acres of land, in San Joaquin County, California, taken by the construction of the Stockton Diverting Canal at \$500 per acre.....	\$20,000.00
To value 20 acres of orchard at \$1,000 per acre.....	\$20,000.00
Residence valued at \$10,000, and barns, outhouses and other improvements valued at \$6,000 destroyed by flood of 1911.....	\$16,000.00
Total	\$56,000.00

In the Court of Claims.

II. GENERAL TRAVERSE.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. HISTORY OF PROCEEDINGS.

On July 17, 1916, a joint motion of parties was filed to consolidate the cases of Theodore Infalt, No. 31191; Richardson Russell Smith, No. 32901; Silva Sanguinetti, No. 32913 and Stefano Sanguinetti, No. 32914.

On July 24, 1916, the court ordered that "ht- several cases may be heard together as individual cases."

IV. ARGUMENT AND SUBMISSION OF CASE.

On December 3, 1919, this case was argued and submitted by Messrs. Benj. Carter and F. Carter Pope, for the plaintiff, and by Mr. Philip G. Walker, for the defendant.

8 V. *Findings of Fact, Conclusions of Law, and Opinion of the Court by Downey, J., Concurred in by Graham, Hay, Booth, Judges, and Campbell, Ch. J.*

Entered Feb. 16, 1920.

No. 32914.

STEFANO SANGUINETTI

v.

THE UNITED STATES.

No. 32913.

SILVA SANGUINETTI

v.

THE UNITED STATES.

No. 32901.

RICHARD RUSSELL SMITH

v.

THE UNITED STATES.

No. 31191.

THEODORE INFALT

v.

THE UNITED STATES.

NOTE.—These cases are not consolidated but were submitted together and since many of the detailed findings are applicable to the general situation and to all cases, the findings are made in this form. The particular facts applicable to each individual case are separately stated in separate findings.

These cases having been heard by the Court of Claims the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

Claimants are citizens of the United States and reside in San Joaquin County, Calif. They have always borne true faith and allegiance to the United States, and have never voluntarily given aid or comfort to its enemies.

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II.

The Calaveras River, having a drainage area of about 491 square miles, rises in the foothills of the Sierra Nevada Mountains, to the northeast of the city of Stockton, Calif., and flowing in a generally southwesterly direction passes to the north of the city of Stockton and empties into the San Joaquin River about $2\frac{1}{2}$ miles below the mouth of a channel, known as Stockton Channel, about $2\frac{1}{2}$ miles in length and 150 feet wide, which connects the city of Stockton with the San Joaquin River, a tidal stream flowing into San Francisco Bay. Stockton is a commercial and manufacturing city of about 27,000 inhabitants. It is the upper terminal of the greater part of the commerce of the San Joaquin River. The water-borne commerce of Stockton amounts to approximately 500,000 tons annually valued at about \$30,000,000, and for many years, beginning in 1885, the Government had been attempting to maintain by dredging, with only partial success, a depth of 9 feet at low water in said Stockton Channel, at an average annual expense of over \$7,000.

III.

The Calaveras River comes out of the foothills of the mountains near Bellota which is about 16 miles northeast of Stockton. Above and again nearer Bellota the river divides and flows in different channels, the capacity of which is so limited that during freshets a considerable part of the waters flow across the country, not uni-

formly distributed but for the most part carried in shallow depressions or swales extending in the direction of the general slope which is from northeast to southwest.

Near Bellota and now confluent with the Calaveras River is the head of Mormon Slough, which runs thence in a southwesterly direction, bending gradually to a nearly westerly direction toward Stockton, passing through the southern part of the city of Stockton, and emptying into Stockton Channel about 1 mile below its head. It is navigable for about $1\frac{3}{4}$ miles above its mouth, and there constitutes a part of the commercial water front of the city. The course of the Calaveras River from Bellota is westwardly, thence northwestwardly, thence southwestwardly, passing north of Stockton to its confluence with the San Joaquin River, approximately 2 miles northwest of Stockton. Gradually diverging below Bellota the Calaveras River and Mormon Slough attain a distance apart of approximately 7 miles, whence they converge to a distance of approximately 4 miles at a point opposite the junction of the diverting canal with the Mormon Slough.

A map entitled "Stockton and Mormon Channels, Stockton Diverting Canal and Vicinity," issued out of the United States Engineer Office, San Francisco, Calif., March 19, 1913, over the signature of S. A. Cheney, major, Corps of Engineers, United States Army, in evidence as a part of House Document No. 256, Sixty-third Congress, first session, to which it is attached, is made a part of these findings by reference without printing herein.

The Calaveras River was and is a "rainy weather" or "wet season" river, supplied by rains exclusively or very nearly so, rising and falling in proportion to the rainfall and dry during a portion of each year and Mormon Slough possessed much the same characteristics except that after the diversion to it of a part of the waters of the river it carried more water than the river and became practically the main channel. Until about 1862 the low water flow of the Calaveras River was carried in what was known as the Old Calaveras River, none of it passing into Mormon Slough, but after a very high water in 1862 the flow was largely diverted into Mormon Slough. One tradition is that the flood of 1862 so filled the channel of the river with mining debris that its waters were thereby diverted into the slough while another is that ranchers along the slough, desiring the use of the water, cut a canal connecting the slough with the river and thus diverted the water, the slough enlarged by erosion assisted by the breaking up of the hard-pan by the ranchers where it interfered with erosion, and the slough became the principal water course. In 1887 ranchers on the Calaveras River diverted the water back into the Old Calaveras River, a suit was instituted by ranchers on the slough because of the wrongful diversion of the water and it was decided in their favor, the court holding that the slough had become in fact a channel of the Calaveras River.

Later, the ranchers along the Calaveras, being unable to obtain the water for irrigation and other purposes and finding an opportunity to relieve themselves from floods, encouraged the flow of the

waters into Mormon Slough by aiding natural erosion thereof and also aiding natural growths and consequent silting in the old channel. On the other hand, the ranchers along the slough, finding later that the enlargement of the slough and the increase of the flow of the water therein was increasing their liability to damaging floods undertook to divert the water by way of North Channel, a minor channel which left the main channel of the Calaveras above the head of Mormon Slough and reentered it about 2 miles below, but Mormon Slough had become so enlarged and the old channel of the Calaveras had so filled up and was at such higher elevation that their purpose was not accomplished.

The territory lying between the Calaveras River and the Mormon Slough had always been subject to flooding to a greater or less extent caused by breaks in the low levees along the Calaveras and the slough or the overflow of those streams and heavy rainfalls on the area, and the city of Stockton had been subject to frequent floods, but they were not serious, as most of the flood waters passed to the north of the city, until the Mormon Slough became the principal outlet of the upper Calaveras River and the principal drainage channel for the contiguous watershed. In periods of high water the slough carried large quantities of sediment, and prior to the construction of the diverting canal this sediment was deposited near its mouth and in the Stockton Channel, interfering with navigation and entailing necessary annual expense for dredging, in addition to which the water carried by the slough frequently flooded portions of the city of Stockton.

IV.

After an investigation followed by report and recommendation to Congress, House Document 152, Fifty-fifth Congress, Third session, Congress, by a provision in the rivers and harbors appropriation act of June 13, 1902, 32 Stat. 331 at 368, appropriated

11 \$50,000 "For the rectification of the Stockton and Mormon Channels at and near the city of Stockton, Calif., by the construction of a canal to divert the water of the Mormon Channel into Calaveras River" in accordance with the report referred to above, and authorized contracts by the Secretary of War for the completion of the work not to exceed \$175,000.

In addition to the construction of the canal proper the project, as recommended, contemplated the construction of four highway bridges over the canal on roads intersected thereby and also contemplated an increasing of the capacity of the Calaveras River below the mouth of the canal by dredging and the raising of the levee on the north bank thereof opposite and below the mouth of the canal by use of the dredged materials.

The names "Mormon Channel" and "Mormon Slough" were and are used with reference to the same water course, the name "Mormon Channel" coming to be applied after it had become the chief water course in its relation to the Calaveras River and more particularly to its lower portion in and near the city of Stockton, a part of which was navigable and used as a commercial water way.

Accordingly the United States constructed through a soil consisting of 1 to $1\frac{1}{2}$ feet of light adobe superimposed on a red, sandy clay, a canal 150 feet wide on the bottom, 7.9 feet deep, with banks to a slope of $1\frac{1}{2}$ on 1 and about $4\frac{1}{2}$ miles in length, intersecting Mormon Slough about 3 miles above or east of Stockton and running in a northwesterly direction to and into the Calaveras River, and constructed a dam across Mormon Slough just below the intersection of the canal, for the purpose of diverting the waters of the slough through the canal and into the Calaveras River and thence into the San Joaquin River below the mouth of Stockton Channel, and thus preventing the filling up of that channel and obviating the necessity and expense of the frequent dredging thereof. Another anticipated result was to prevent the flooding of the city of Stockton. The canal was completed March 18, 1910.

The canal was constructed on a right of way 400 feet in width and so located that there remained an unexcavated bank on the northeast side, within the right of way, and on the southwest or lower side a levee was constructed of the materials excavated from the canal. The dam across Mormon Slough was practically a continuation of this levee.

There were low levees along Mormon Slough above the intersection of the canal, the extent of which, however, are not accurately shown, and there were levees along the Calaveras, both above and below the mouth of the canal, for the protection of farming lands, much of which were reclaimed lands and very low.

Many thousands of acres of land to the north of the Calaveras were swamp lands originally covered by water, mostly from the San Joaquin River, and in addition to their reclamation by private systems of reclamation levees and draining, mostly by pumping, their owners had cooperatively built the levee along the north side of the Calaveras for their protection. In dredging the Calaveras below the mouth of the canal to increase the capacity of the river and care for the increased flow of water the dredged materials were placed on this levee up to a point a short distance above the mouth of the canal,

and it was thereby very much widened and raised and strengthened. It was not made of such width and height as it

was because of assumed necessity for so much strengthening, but because of the excess quantity of materials to be disposed of. The levee further eastward along the Calaveras remained as theretofore constructed and maintained—lower, lighter, and of less strength. In 1910 some time after the completion of the project, a “self-appointed committee” of landowners on the north side of the Calaveras requested of an engineer officer of the United States representing the district engineer that the old levee to the eastward on the north side of the Calaveras be strengthened by the United States to obviate danger of their lands being flooded, but he expressed the opinion that the canal had been so constructed as to maintain conditions as they were, and declined to recommend that this work be undertaken by the United States.

The waters which left the Old Calaveras River and flowed into Mormon Slough at their junction were never returned to the Cala-

veras until their diversion by and after the construction of the canal and dam. Waters overflowing the upper Calaveras and slough onto the area between them and other waters finding their way onto that area by rainfall or otherwise did not find their way into the slough nor into the Calaveras above the canal, but flowed over that area in a generally southwesterly direction with the slope of the area, moving in depressions or swales to the extent of their capacity and then over the other parts of the area, until they found their way into the canal and, diverted thereby, were carried thence into the Calaveras. This area had a fall from the northeast to the southwest of approximately 5 feet to the mile. In adopting the plan for this work it was contemplated that the waters flowing over this area which otherwise would have continued on toward Stockton should be intercepted by the canal and thus diverted to the Calaveras.

V.

High waters in the Calaveras River section generally occur during January, February, and the earlier part of March and, to a greater or less degree, dependent on the amount of rainfall, are of almost annual occurrence. The waters rise and recede rapidly and flood conditions are frequently of recurrence in the same year during those months.

At the time the diversion canal project was prepared, which was in 1898, several years before its actual construction, there was but little available data as to the flood discharge of the Calaveras River and Mormon Slough. There was no gauge until December, 1906, when a gauge was established by the Weather Bureau near Jenny Lind on the Calaveras, about 25 miles above the canal, after which daily gauge heights at that point were obtainable, but conditions below were not accurately indicated thereby.

In January, 1911, there were two high waters which were of minor importance except for their effect in leaving the water shed in favorable condition for the heavy subsequent run off, which, by reason of very heavy rains, came on the 30th and 31st of January, 1911, and was an unprecedented flood unless the flood of 1862 may have been greater as tradition has it. The levees on the Old Calaveras River, and on the Mormon Slough, between Bellota and the canal were broken in several places so that they had little effect in confining the course of the water. Some of it flowed south of Mormon Slough, and some north of the Calaveras, but the greater part of that beyond the capacity of the river and slough flowed across the country between the river and the slough. From a large break in the levee above Linden, which is about 4 miles below Bellota, the Linden Road, which is in a natural trough, carried a large volume of water. The waters flowing in the slough in great volume and to its capacity were diverted by the dam into the canal except as to some overflow which passed on toward Stockton, and the large volume of water flowing over the country between the slough and the Cala-

veras was intercepted by the canal and the aggregate volume turned toward the Calaveras, but the volume was in excess of the capacity of the canal and also, when combined with the waters in the Calaveras, in excess of the quantity which could find a ready and rapid outlet down that stream, with the result that, by reason of the excess quantity of water reaching the canal and the retarding of its flow by the waters in the Calaveras, and also, to some extent by the bridges over the canal, the lands above or to the northeastward of the canal and for the full length thereof were overflowed, the overflow extending in varying depths from one-half to 1 mile, according to the contour of the land, the greatest distance and depth occurring in the pocket formed by the canal levee and the levee on the north bank of the Calaveras, where a lake was formed. The waters flowing in and parallel with the canal, moving in greater volume and with greater force than those in the Calaveras, threw the current of the river to the levee on the north bank and backed up the waters of the Calaveras, to the northeast. Across the Calaveras River, approximately 500 feet below the mouth of the canal, was a bridge or trestle of the Southern Pacific Railroad which to some extent obstructed the flow of the waters and contributed to the backing up thereof. A result of the backing up of the waters in the Calaveras and the embanking of them against the levee on the north bank thereof was a break in that levee at a point above and opposite the mouth of the canal and the break was soon enlarged by erosion. On the north of the river below or westward from this break was an embankment of the Southern Pacific Railroad, containing a 15-foot trestle and two small culverts, and this embankment tended to restrain the waters flowing through this break and also flowing down on the north side of the river and, in a triangular pocket between it and the levee on the north side of the river, another lake was created contiguous to that on the other side above the canal. Low-lying lands, extending for a considerable distance north of the river and for some considerable distance both above and below this break in the Calaveras levee, were flooded, but the waters flowing through the break were not the only cause thereof. Waters flowing down the north side of the river from breaks above and in waterways on that side thereof contributed thereto. The proportionate contribution from either source does not appear and is speculative.

The years 1912 and 1913 were comparatively dry years and there were no high waters of consequence, but in 1914, 1915, 1916, and 1917 there were floods which to a greater or less extent inundated the lands northeast of the canal. By reason of the filling of the canal

by deposits during successive floods a less volume of water
 14 caused a flooding of these lands. In 1914, when the highest water after 1911 occurred, it attained a height on these lands within 1 foot of that of 1911 and in this year the flood again broke through the levee on the north side of the Calaveras which had been in some manner repaired after the flood of 1911.

The duration of flooded conditions on these lands varied, dependent on the duration of the rains causing them and the time necessary for the accumulated waters to find their way down the Calaveras.

Sometimes floods ran off in a few hours. In 1911 flood conditions lasted for two days. At times in later years as one flood ran off a recurrence of heavy rains caused a recurrence of flood conditions. The rapid run off of floods immediately cleared these lands of water except as to low places having no outlet where the water remained in pools until absorbed by the earth.

During the flood of 1911 a large quantity of water flowing over the area between the Calaveras River and Mormon Slough flowed onto the lands northeast of the canal and would have flowed thereon if the canal had not been constructed. To what extent these waters in 1911 would have accumulated on, flooded or damaged these lands but for the canal does not specifically appear and is speculative.

It is shown that lands in this area lying $2\frac{1}{2}$ miles east of the canal and about the same distance north of Mormon Slough were flooded twice in 1907 to a depth of approximately 3 feet and that they were always flooded during heavy rains when the levees broke up near Bellota and that the lands in that vicinity were flooded "about one year out of three" to a greater or less extent. Whether the same conditions prevailed in other localities within this area and nearer the site of the canal is not directly shown. High-water marks exhibited to United States engineers investigating conditions indicated that "the whole country" in the vicinity of the canal was subject to overflow before its construction, in times of extreme high waters, but just what the flood conditions were in this area or in particular parts thereof, except as stated in these findings, is not specifically shown.

VI.

The general effect of these floods on these lands northeast of the diverting canal, varying at different points as conditions varied, was as follows: In some cases some of the top soil, where the ground was freshly plowed and the current swift, was washed off. Noxious weeds and grasses and logs and stumps were sometimes carried onto portions of the lands. It required labor to clear off the weeds and grasses and, if neglected, they sometimes took root and rendered cultivation more difficult. Logs and other timber carried onto the lands were generally collected and used for fire wood. The lands were mostly alkali and the water served to bring the alkali to the surface. If washed off by the water, as frequently happened, the effect was beneficial, otherwise detrimental. The lay of the surface of the land was altered to some minor extent, principally by deposits of silt, sometimes filling irrigation ditches and requiring their cleaning out. Silt was deposited on the lands which was generally beneficial, enriching and increasing the productivity of the soil, but it was otherwise occasionally where there were some deposits of sand or gravel. Some fruit trees were injured by the water, many others not, and occasionally trees were uprooted by the force
 15 of the water. Grain crops, such as barley, a good deal of which was grown in this country, were damaged by being
 flooded, but alfalfa was generally benefited if the water readily ran
 off within a few days. Dependent largely on the time of a flood,

inability to plow the lands until they had sufficiently dried out sometimes delayed planting beyond the usual time, but it does not appear that the cultivation of any of the lands here in question in some suitable crop was prevented by the floods. Corn, potatoes, and some other crops could be successfully planted in this locality as late as the 1st of May.

VII.

Claims for damages alleged to have been caused by the overflow of 1911 were, by these plaintiffs and by many other landowners in the vicinity of the diverting canal and north of the Calaveras River, about seventy in all, presented to the United States through the engineering officers, the aggregate amount thereof exceeding half a million dollars. A bill was introduced in the Senate on the 1st of August, 1912 (S. B. 7405, 62d Cong., 2d sess.), providing for the payment of 20 enumerated claims, Stefano Sanguinetti among them, and those claims were referred to the Engineer Corps, War Department, for investigation and report. Many other claims were then on file in that office. No action was had on the Senate bill referred to after its reference to the Committee on Claims. These actions were commenced in this court in August, 1914.

VIII.

It is not shown either directly or inferentially that the United States or any of its officers acting for or in their behalf, in the preparation of the plans for the diverting canal or in its construction had any intention to thereby flood any of the lands here involved or had any reason to expect or anticipate that such results would follow. The fact that the canal was of insufficient capacity to care for the waters coming down Mormon Slough augmented by the waters flowing to it over the area between the slough and the river, during periods of very heavy rains and extremely high water, was an engineering mistake due to lack of accurate information as to the conditions to be met during such periods. The engineers of the United States who made the preliminary examination and recommended the plan reached the conclusion, based on such information as they had, that the canal as proposed would have a greater capacity than would be required for the expected volume of water to be carried and that the Calaveras River below the mouth of the canal, when dredged as recommended, would have a capacity considerably in excess of the combined volume of water to be carried by it. The canal was constructed as recommended by the Government engineers. Work was done on the Calaveras below the mouth of the canal both by dredging and by depositing the dredged materials on the levees on the north side, but whether this part of the work was completed as recommended does not satisfactorily appear.

IX.

The flood of 1911 had been of such magnitude that some of the waters breaking through the small levees along Mormon

16 Slough on the south side and otherwise overflowing its banks and to some extent escaping at the dam had followed approximately the old course of the slough to Stockton and deposited silt in portions of Mormon and Stockton channels and the river and harbor act of July 25, 1912 (37 Stat. 201-230), authorized and directed the Secretary of War to cause various preliminary examinations and surveys to be made, among them being—

“Stockton and Mormon channels, California, including the diversion canal, with a view to determining what, if anything, may or should be done by the United States, either alone or in conjunction with the city of Stockton and the State of California, or with either of them, in order to increase the capacity of said diversion canal from its upper end in Mormon Channel to the mouth of Calaveras River in the San Joaquin River, so that said canal shall carry the entire flood flow of Mormon Channel and thus prevent the deposit of material in the navigable portions of Stockton and Mormon channels.”

The District Engineer of that district made a report to the Chief of Engineers, August 12, 1913, in which he reviewed conditions, particularly with reference to the flood of 1911, and suggested plans which might be adopted, “should the United States decide to relieve existing flood conditions.”

He concluded “that the project for Stockton and Mormon channels, including the diversion canal,” was unsatisfactory because—

“(a) It has not entirely prevented deposit of silt in Stockton and Mormon channels,

“(b) It has been made the basis of claims against the United States for damages due to flooding,

“(c) It has not provided bridges appropriate to the traffic to be carried and the highway system to which they belong.”

expressed the opinion—

“That such silt as now reaches the navigable portions of Stockton and Mormon channels can best be removed by dredging; that the United States should not pay any damages due to flooding; and that the United States should not reconstruct the bridges across the diverting canal.”

and by way of recommendation said,

“Under the circumstances, I do not consider that the interests of navigation warrant the expenditure by the United States of more money on the project or any considerable elaboration of it, and no survey is recommended.”

The views expressed in this report were concurred in by the division engineer, the report was examined, commented on and concurred in by the “Board of Engineers for Rivers and Harbors,” the views of the district engineer, the division engineer, and the

board of engineers were concurred in by the Chief of Engineers, who, however, expressed the opinion that the project had fairly well served the purpose for which it was designed, and these reports were, by the Secretary of War, transmitted to the Speaker of the House of Representatives, referred to the Committee on Rivers and Harbors, and printed in House Document 256, Sixty-third Congress, first session, in evidence in these cases.

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X.

The act of Congress (32 Stat. 331 at 368) which appropriated for and authorized the construction of the diverting canal contained a proviso as follows:

"Provided further, That the city of Stockton or the State of California shall first furnish to the United States the right of way for said canal."

The Legislature of the State of California, by an act entitled:

"An act authorizing the commissioner of public works to obtain a right of way for a canal to divert the waters of Mormon Channel into the Calaveras River, to maintain condemnation suits therefor, and making an appropriation to pay for said right of way and costs and expenses of obtaining the same," approved March 25, 1903, authorized the commissioner of public works to obtain, either by purchase or condemnation suits, a right of way for such diverting canal. The commissioner of public works thereafter acquired, in most cases by grant but in some cases by decree of condemnation, the right of way for said canal and thereafter by his proper indenture, dated February 6, 1907, duly acknowledged and recorded and in which he made specific reference to each grant to him and to each order of condemnation in his favor, he conveyed the right of way to the State of California pursuant to direction contained in an act of the Legislature of that State.

Thereafter, pursuant to an act of the Legislature of the State of California, directing the governor of the State to execute and the secretary of state to countersign and deliver a conveyance of said right of way to the United States, the governor of the State of California, in the name of the State, by his letters-patent dated March 28, 1907, duly acknowledged by the governor and countersigned and delivered by the secretary of state on the same day, conveyed said right of way to the United States.

XI.

(No. 32914.)

Stefano Sanguinetti, the plaintiff in case No. 32914, was at and before the time of the building and completion of the diverting canal and until May 27, 1915, the owner of a tract of land containing, before the right-of-way conveyance hereinafter referred to, approximately 200 acres which bordered in part on the south side

of the Calaveras River and extended southeastwardly in the general direction of the diverting canal thereafter constructed.

The right of way for the diverting canal extended through and divided these lands, leaving the larger part on the southwest or lower side of the right of way, but leaving on the northeast or upper side two triangular tracts containing together about or a little more than 60 acres. Condemnation proceedings were instituted by the commissioner of public works for the condemnation of the right of way through these lands, but at some time before final decree and on the 3d day of May, 1906, Stefano Sanguinetti, his wife joining, executed to Frank D. Ryan, commissioner of public works for the

State of California, a deed for the right of way for the diverting canal through these lands, which deed, with the certificate of acknowledgment and indorsement thereon, is as follows:

"Whereas, by an act of the 57th Congress, passed at its first session in 1902, an appropriation was made, to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers, for the rectification of Stockton and Mormon channels at and near the city of Stockton, California, by the construction of a canal to divert the waters of the Mormon Channel into the Calaveras River, provided the city of Stockton or the State of California furnish to the United States the right of way for said canal and

"Whereas, by an act of legislature, approved March 25, 1903, the commissioner of public works was authorized to obtain, by purchase or by condemnation suits, a right of way for such diverting canal from the Mormon Channel to the Calaveras River east of the city of Stockton, in San Joaquin County, and along the channel of said Calaveras River as far as may be necessary, according to the surveys for such canal adopted by the United States Government; and

"Whereas, according to the surveys for such canal adopted by the United States Government, the hereinafter-described land is a necessary part of the right of way for such diverting canal; and

"Whereas, Frank D. Ryan is such commissioner of public works:

"Now, therefore, in consideration of the premises and in consideration of the receipt of the undersigned of the sum of five dollars (\$5) in gold coin of the United States of America, and of other valuable considerations, the receipt of which by the undersigned is hereby acknowledged, the undersigned hereby grants, sells, and conveys unto the said Frank D. Ryan and to his successor or successors in office (and to his or their assigns, the city of Stockton or the State of California, if conveyance to either is, or becomes, or should be proper, convenient, or necessary in order to convey the same to the United States of America) and to his or their assign, the United States of America, the right of way for such diverting canal over, across, upon, in, through, or under all that certain piece or parcel of land situated, lying, or being in the county of San Joaquin, State of California, particularly described as follows to wit:

"Portions of sections 29, 41, and 42 of C. M. Weber's grant, 'El Rancho del Campo de los Franceses:'

"Beginning at the point of intersection of the north line of San Joaquin County survey No. 2873, with the west line of that portion of San Joaquin County, survey No. 1345, which lies in section 41 of C. M. Weber's grant 'El Rancho del Campo de los Franceses,' said point being a corner of said survey No. 1345; and run thence north 73 deg. 60' east 281.7 feet; thence south 61 deg. 45' east 2,327 feet; thence south 17 deg. 00' east 237 feet; thence south 73 deg. west 326 feet; thence north 61 deg. 45' west 5,062 feet; thence north 75 deg. 10' west 305 $\frac{1}{2}$ feet to east line of lands of M. A. Podesta; thence north 17 deg. 00' west 138 feet to center line of the Calaveras River; thence upstream, along the center line of the Calaveras River, north 84 deg. 10' east 260 feet; thence north 63 deg. 30' east 250 feet; thence north 65 deg. 50' east 30 feet; thence south 61 deg. 45' east 2,397 feet; thence south 17 deg. 00' east 284 feet to the point of beginning, and containing 48.71 acres.

19 "Together with the right of ingress and egress to and from the same and the right to dig, build, construct, and maintain said diverting canal upon such right of way and within the limits of said parcel of land, on the part of the United States of America, its officers, engineers, agents, employees, servants, or contractors and their subcontractors, officers, engineers, agents, employees, and servants.

"And together therewith such of the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining as may be necessary, convenient, or proper to accomplish such purposes and the objects of such and other statutes.

"To have and to hold, all and singular, the said premises, together with such rights, tenements, hereditaments, and appurtenances for the uses and purposes aforesaid unto the commissioner of public works, his said successors and assigns forever.

"It is expressly admitted and understood by the undersigned that the intent of this grant of such right of way is to grant such a right of way and in such form that such project may be accomplished properly, expeditiously, and fully by such public authorities.

"In witness whereof, the undersigned has hereunto set his hand and seal this third day of May, A. D. 1906. Stefano Sanguinetti. (Seal.) Geromina C. (her x mark) Sanguinetti. (Seal.)

his wife.

"Geromina C. Sanguinetti being unable to write, she made her mark in my presence and I wrote her name at her request and in her presence. E. L. Wilhoit."

"Also witness to the mark and signature of Geromina C. Sanguinetti. Thos. S. Louttit. (Seal.)"

"STATE OF CALIFORNIA,

"County of San Joaquin, ss:

"On this third day of May, in the year one thousand nine hundred and six, before me, E. L. Wilhoit, a notary public in and for the said county of san Joaquin, State of California, residing therein, duly commissioned and qualified, personally appeared Stefano San-

guinetti and Geromina C. Sanguinetti his wife, known to me to be the persons described in, whose names are subscribed to, and who executed the annexed instrument, and acknowledged to me that they executed the same.

"In witness whereof I have hereunto set my hand and affixed my official seal at my office in the city of Stockton, county of San Joaquin, the day and year in this certificate first above written. E. L. Wilhoit, Notary Public in and for the County of San Joaquin, State of California. (Seal.)"

"(Indorsed:) Deed of right of way, diverting canal, Stefana Sanguinetti and wife to Frank D. Ryan, as commissioner of public works. D-25. Recorded at request of Ashley and Neumiller, May 3, 1906, at 21 min. past 11 o'clock a. m., in Book A, vol. 145 of Deeds, page 396, San Joaquin County records. Otto Von Detten, recorder. (16.) Office of Chief of Engineers, Nov. 20, 1907. 20 25746-157. War Department. Office of the Secretary, Nov. 20, 1907. 1937-116. War Department."

This deed is specifically mentioned in the deed of the commissioner of public works to the State of California, referred to in Finding VII, as one of the grants by which the right of way for the canal was conveyed to him, said commissioner.

The consideration paid to said Stefano Sanguinetti for said conveyance by him of said right of way was \$14,000.

XII.

The portion of Stefano Sanguinetti's land left on the northeast or upper side of the canal right of way was in two separate triangular tracts of approximately the same size, which contained in both sixty or more, probably sixty-six and a fraction, acres.

One tract, which for convenience of reference is designated tract No. 1, was in the V-shaped junction between the canal right of way and the Calaveras, the Calaveras side running in curves and irregularities with the meanderings of the river, the right of way side running in a straight line with the line of the right of way and about .44 of a mile in length. The east side was a straight north and south line. The other tract, which for convenience is referred to as tract No. 2, laid further southeastward, along the canal right of way and at its nearest point was distant from tract No. 1, along the line of the right of way, about 400 feet. It was in the form of a right-angled triangle with the hypotenuse on the line of the right of way and about .43 of a mile in length, the other sides being of approximately equal length.

Previous to the flood of January 30-31, 1911, the greater portion of both of these tracts was under cultivation in orchard consisting of cherry, apricot, pear, peach, plum, fig, and perhaps other trees to the amount of about 17 acres on tract No. 1, and vineyard, vegetables, barley, and alfalfa. There was approximately 20 acres which *was*

not under cultivation but whether because unfit for cultivation or for some other reason is not shown. For some crops cultivation by irrigation was necessary, for others desirable but not necessary, and this was accomplished by the use of water pumped from shallow wells. The water plane was an average of approximately 10 feet below the surface of the land.

On tract No. 1 was the Sanguinetti residence, a large two-story brick house built by Stefano Sanguinetti, and of the value of \$10,000. It was located about 500 feet from the canal right of way and 800 feet from the Calaveras River at their nearest points and 1,700 feet from their junction. It was constructed on ground of approximately 1 foot higher elevation than that along the right of way at its nearest point, and was so elevated on its foundations that the first main floor and the verandas were approximately 6 feet above the surrounding ground. In the vicinity of the house were two barns and other necessary outbuildings. One of the barns was very old and originally of poor construction, but the other was comparatively new and well built.

The surface of tract No. 1 was generally even but with some comparatively low places, and the slope from high to low points was about 2 feet. The elevation on the east side at the right-of-way line, being the south end of the east line, was substantially the same as in the north corner, being the north end of the east line, and these elevations were approximately 2 feet higher than the elevation in the pocket near the junction of the right of way and the river. In some places the elevations north of the right-of-way line were lower than the right-of-way line immediately south thereof. The variations in elevation of tract No. 2 were slight, varying to a maximum of approximately $2\frac{1}{2}$ feet, and the difference in elevation between the land in the right angle, most remote from the right of way, and that along the right of way was from approximately 1 to $1\frac{1}{2}$ feet.

The flood of January 30-31, 1911, covered both of these tracts to an approximate depth of from $2\frac{1}{2}$ to $4\frac{1}{2}$ feet with some slightly greater depth over a few low places. The water immediately surrounding the residence attained a depth of near $3\frac{1}{2}$ feet, or approximately $2\frac{1}{2}$ feet below the main or first floor, and flooded the basement or cellar. As the flood increased, the water moved in the canal with considerable rapidity, and for a time flowed over a part of the land, particularly that in and toward the pocket, with a rather strong current, but when the coming together of the waters in the canal and river had so augmented the volume that it could not find a ready outlet and began to back up in the river the water over these lands became sluggish and moved with but little current. This flood continued for about two days, but what its varying stages during that period were, except the maximum as stated, is not shown.

At the residence the front steps to the veranda were washed away. It is not satisfactorily shown that the house was otherwise damaged or rendered in any wise uninhabitable or unsafe for occupancy. It was in good condition inside and out after this and subsequent floods.

Stefano Sanguinetti lived in this house during this flood and continued to live there until some months after the flood of 1914, when he moved to Stockton. It is asserted that he was "driven out by the floods." It does not appear that there was any reason why he might not have continued in the occupancy of the house except the inconvenience entailed during the brief periods when it was surrounded by water. One of his sons was farming the land during 1911 and subsequently as a tenant. The amount of actual damage to the house by the flood of 1911 is not shown, but it was negligible. It was not materially depreciated in value by that flood. It was depreciated in value by that flood in conjunction with floods of subsequent years, indicating a continuing danger of recurrence of floods in flood seasons and consequent inconvenience. That depreciation was 25 per cent of its value.

A very old barn, already in bad condition, was so damaged as to be unfit for further use by the flood of 1911. Its value was \$400. The newer, better-constructed barn, was not damaged. A chicken house was washed away, but its value is not shown.

There were about 1,500 fruit trees on tract No. 1. A few, the number not shown, were uprooted during the flood of 1911. Others died thereafter, but how many, if any, died from the effect of the flood is not satisfactorily shown. The damage in the aggregate to the orchards by this flood was \$500.

These two tracts of land, aside from the orchard, by reason of the deposits of weeds and debris, necessitating clearing off, filling of ditches, etc., and some deposits of sand and gravel, offset by deposits of valuable silt, were damaged by the flood of 1911 to the amount of \$300.

By reason of the thereafter apparent liability to frequent recurrence of floods on these lands, they, exclusive of the residence, were depreciated in value \$2,000. Some crops upon these lands were damaged or destroyed by the flood of 1911, but compensation for all such loss is claimed by Silva Sanguinetti as tenant and sued for by him in case No. 32913.

None of this land was permanently overflowed nor was it overflowed for such length of time, either in 1911 or subsequent thereto, as to prevent its use for agricultural, horticultural, or orcharding purposes. It has been cultivated and the products of the orchard marketed each year since the flood of 1911, and there have been recurrent floods of greater or less magnitude each year except the dry years of 1912 and 1913. In 1914, after the floods of that year, there was a less proportionate area not under cultivation than before 1911. Of a total area of 66.62 acres, 15.67 were not under cultivation. The buildings and roads occupied 2.26 acres, 17.77 acres were in orchard, 404 acres in alfalfa, 1.92 acres in potatoes and 24.96 acres in beans and other vegetables. Fruit trees were set out subsequent to 1911 and 1914 and 2 acres of fruit trees were set out as late as 1917 at a point near the canal. Some crops were not so good and the fruit yield not so plentiful subsequent to as before 1911, but lack of good care, particularly of the trees, was apparent.

Stefano Sanguinetti, a resident of the State of California, died intestate on the 27th day of May, 1915, and his estate has been administered on and settled and a final decree of distribution entered. He left him surviving as his heirs at law his widow, Geromina Sanguinetti and seven sons and daughters, all of full age, viz: Annie Sanguinetti, Rose Vignolo, Palmyra Mazzer, Fred A. Sanguinetti, Louis R. Sanguinetti, Henry J. Sanguinetti and Silvio T. Sanguinetti. A petition entitled "Amended petition" verified on the 26th day of May, 1919, by the attorney in fact for the heirs above named, and in which they appear as the plaintiffs, is attached to the record herein but such so-called amended petition was never filed in the clerk's office of this court, is in no manner noted or referred to on the docket and leave to substitute parties was never asked of or granted by the court. Said so-called amended petition was verified subsequent to the filing of the requests for findings of fact and briefs.

XIII.

(No. 32913.)

Silva Sanguinetti, the plaintiff in case No. 32913, was in possession as a tenant of Stefano Sanguinetti, of the lands referred to in the last preceding finding as tract No. 1 and tract No. 2, at the time of the flood of January 30-31, 1911.

On tract No. 2 he had in growth about 30 acres of barley then a few inches high which was destroyed by the flood and was worth \$420.

He also had in growth a crop of onions which was destroyed and which was worth \$300.

23 Two stacks of hay harvested off this land and worth \$300 were washed away and 2,000 gallons of wine of the value \$400 were destroyed.

His contract of renting with his father Stefano Sanguinetti was on the basis of a division of the crops but the proportions to go respectively to the landlord and tenant are not shown.

XIV.

(No. 32901.)

Richard Russell Smith and Nellie Alice Smith, brother and sister, were each the owner before and during 1911 of an undivided one-half of sections 19 and 20 and parts of sections 21 and 30 in township 2 north, range 6 east, in San Joaquin County, Calif., containing about 1,750 or 1,800 acres of land and lying, at its nearest point, a mile and a half north of the Calaveras River and extending thence northward a mile and a half, and from the junction of the diverting canal and the Calaveras River about two and a half miles northwestwardly, and extending westwardly about $2\frac{1}{2}$ miles, and from the San Joaquin River about a mile and a quarter northeastward. About 1,400 acres of it were "lowlands" and the remainder

"highlands." These lowlands were part of a large acreage in that locality lying east and northeast of the San Joaquin River below the mouth of the Calaveras and north of the latter, which were originally overflowed or swamp lands, and were reclaimed by constructing reclamation levees and draining and pumping. The Smith lowlands before reclaimed were overflowed lands and when first acquired were under water continually. Reclamation levees were constructed around this land principally for protection against water coming from the east from the San Joaquin River and through sloughs carrying waters from that river, particularly "12-mile slough." Two or three sloughs of considerable size bordered or intersected the Smith lands. Water accumulated in greater or less quantities on these lands, after reclamation, from rainfall and seepage through and under the reclamation levees, and pumping was necessary each year to free the lands of water before cultivation. Conditions were such that if pumping was not resorted to at intervals the lowlands within the reclamation levees would in course of time have become flooded from seepage and accumulated rainfall.

A part of the Smith lowlands could be irrigated by gravity from the river and in the main the lowlands were fertile, productive and valuable. The highlands were not irrigated, and while grain and hay could be grown thereon without irrigation they were not so productive, could not be used for the same purposes and were not so valuable as the lowlands. Part of these lands in and just previous to 1911 were cultivated by the owners, part were rented for 20 per cent crop rental and part were rented for cash rent. Selected lands in small tracts usually rented for the cultivation of onions and similar crops were rented for as much as \$18 per acre.

When during the flood of January 30-31, 1911, the break occurred in the old levee on the north bank of the Calaveras above and opposite the mouth of the canal, as described in Finding IV, the volume of water from that source spreading over the intervening country and augmented by waters flowing down the north side of the river, flowed onto and over and inundated the Smith lands. Reclamation levees were broken, water from other sources was thereby admitted and added to the volume and these lands, except about 15 acres surrounding the residence, were covered with water to a depth varying from one to a maximum of eight feet.

Some growing crops, particularly barley and onions, were destroyed, some buildings were damaged, and reclamation levees were in places destroyed. The water ran off the highlands after a day or two, but a part of it remained on the lowlands because of their low elevation and retaining levees. Such of that as could be drained off through cuts in the levees was so disposed of, but the remainder had to be pumped out. Whether the water was disposed of as expeditiously as might have been done is not shown, but it was not all removed until such time that it was too late to successfully grow crops on a part of it for that season. These lowlands had been flooded previous to 1911 and had once before that been flooded from the Cala-

veras River. It was customary with farmers in that locality to plant crops after the late winter and early spring floods.

About 300 acres of young barley belonging to plaintiffs and some acreage of onions put in by tenants were destroyed, and hay and perhaps some other crops were damaged by the flood of 1911, and there was a loss of cash rentals otherwise to be anticipated. Some tenants who were to have rented for cash put in crops on shares after the flood. Such crops were not generally good. The damage to the plaintiffs by reason of these conditions was \$12,000. Plaintiffs were put to an expense of \$1,563.98 for pumping, \$5,934.50 for repairing levees, and \$850 for repairing buildings. Some debris collected on these lands which had to be removed at some expense, but there were deposits of silt which were beneficial. The lands, except for damage to crops and temporary interference with cultivation, were not injured. The value of the whole tract, except for the damage recited above entailing expense of repairs, was not depreciated by the flood of 1911. No part of it was permanently flooded thereby and the diverting canal has never so flooded any of it as to prevent its cultivation, except to the extent that it was one of the causes of the conditions recited in 1911.

In 1912 Richard Russell Smith and Nellie Alice Smith granted an option to the California Land Finance Co. to purchase all their lands here involved and on February 25, 1913, entered into a contract of sale of said lands to said company, modified, for some reason not definitely shown, by subsequent agreements, but apparently for the purpose of providing otherwise as to time of payments to be made. The sale price for the entire tract was \$125 per acre, which was a reasonable price and the reasonable value of the land. It is not satisfactorily shown that it could have been sold for a higher price but for the flood of 1911 or but for any thereby increased "impending menace" of floods. The title of record did not pass from the Smiths on the execution of this contract because it was contingent on the performance of the terms as to payments to be made by the grantee. Under the contract the land company "managed the crops" thereafter. The Smiths "had control of it" in 1913, but vacated the premises within a few months after the execution of the contract of sale.

This action was originally instituted on August 18, 1914, by Richard Russell Smith alone, who, in his complaint then filed, demanded \$175,000 as the value of an undivided one-half interest in "Oak Groves Ranch" containing 1,750 acres, "taken by the construction of the Stockton Diverting Canal." Sometime on or subsequent to the 26th day of May, 1919, the date upon which it appears to have been verified, a petition entitled, "Amended Petition," was attached to the record in this case, in lieu of the original petition, without having been formally filed in the clerk's office or noted on the docket and without leave of court. The requests for findings of fact and briefs had then been filed. In this amended petition Nellie Alice Smith, not theretofore a party, is joined as a party plaintiff and the demand is for costs of pumping,

repairing levees, restoring buildings and removing debris, loss of crops and rent money for 1911 and depreciation in value of lands.

XV.

(No. 31191.)

In case No. 31191, Theodore Infalt, no request for findings of fact has been filed by plaintiff as required by the rules of this court, no brief has been filed by the plaintiff and the plaintiff did not appear either in person or by attorney at the submission of these cases.

CONCLUSIONS OF LAW.

Upon the facts found the court concludes as matter of law, as to each of said cases, as follows:

No. 32914, Stefano Sanguinetti: That the case is not within the jurisdiction of the court and should be and is dismissed.

No. 32913, Silva Sanguinetti: That the case is not within the jurisdiction of the court and should be and is dismissed.

No. 32901, Richard Russell Smith: That the case is not within the jurisdiction of the court and should be and is dismissed.

No. 31191, Theodore Infalt: That the case should be and it is dismissed because of the facts found in Finding XV and for want of prosecution.

Judgment is rendered against each of the above-named claimants in favor of the United States for the cost of printing the record herein, the amount thereof to be entered by the Chief Clerk and collected by him according to law.

OPINION.

Downey, Judge, delivered the opinion of the court:

These cases were selected by counsel for submission as representative of about seventy pending cases, in all, founded upon the same general facts. They are submitted together but are not consolidated. For these reasons findings of fact are made which are general in their character and applicable to all the cases, followed by findings as to the particular facts in the individual cases. It is thought that the findings very fully and accurately present the whole situation with which we have to deal and an attempt to restate the facts here in condensed form is not only unnecessary but, since a condensation must sacrifice something of valuable detail, is undesirable. We will refer to the facts found as may be necessary in the discussion of the questions involved.

If there is to be recovery in these cases it must necessarily be upon the theory that there was a taking of the plaintiff's property within the meaning of the fifth amendment to the Constitution.

23 There is much in the record which can only be interpreted as in support of a theory that there could be a recovery for

damages, pure and simple, but that matter is hardly for discussion and the cases are to be treated as for a taking.

It is perhaps appropriate and also important, to the end that we may not lose the proper viewpoint and because also of the suggestion that, in circumstances stated, the distinction between "appropriation of land" and "damage" is a "quibble," that we consider the primary importance of and necessity for the distinction in this court. The fact that the distinction may not be material in California because the constitution of that State provides against "damage" as well as a taking without compensation can be of no force here and the distinction is vital. Perhaps there may sometimes be apparent a disposition to resolve a doubt in favor — a claimant since in no other way can compensation be awarded, but the necessity for the distinction is deep-seated and a proper drawing of the line is of more importance than if it merely involved a liberal interpretation of facts or effects in aid of a deserving claimant. This is because the question to be determined as between a taking and mere damages is in this court jurisdictional. Unless there is a taking within the meaning of the Constitution, implying an obligation to pay, this court is without jurisdiction in this class of cases. There are no presumptions to be indulged in — favor of jurisdiction, it can not be assumed if it does not in fact exist, it can not be conferred by consent of parties it must affirmatively appear, and it is a question for strict construction. The petitions in these cases aver a taking and upon the averment of that jurisdictional fact the court was empowered to hear the cases, but if upon the facts submitted it perchance appears that what the defendant did resulted in the infliction of a consequential injury and did not in fact amount to a taking, it is at once demonstrated that the case is not within the jurisdiction of this court. Therefore, to put a liberal construction on facts appearing to the end that a plaintiff's injuries may be treated as a taking rather than a consequential damage is but to broaden jurisdiction by liberal construction. If we were proceeding under a constitution like that of the State of California it would not be material that the line was not clearly drawn between a taking and damage, for both are included, but under our Constitution the question is primary and vital.

In *Ex Parte McCordle*, 7 Wallace 506, 515, it is said:

"It is quite clear, therefore, that this court can not proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

And in *Reid v. United States*, 211 U. S. 529, 539, it is said:

"But jurisdiction is not a matter of sympathy or favor. * * * The courts are bound to take notice of the limits of their authority."

"The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record of all suits prosecuted before them. To this rule there are no exceptions." *Ex*

Parte Smith, 94 U. S. 456. And a general averment in the petition, sufficient for the purpose at that stage of the case, becomes of no avail for jurisdictional purposes if the facts proven do not sustain it

27 but show the subject matter of the case to be of a different general class as to which there is no jurisdiction. Therefore, the necessity for a strict determination whether the subject matter of the case is a taking or a damage and if the latter, a dismissal, not primarily because it is determined that the plaintiff has not suffered by the acts of the defendant, or because the defendant, the sovereign, has not consented to be liable therefor, but because it has not conferred on the court any jurisdiction to adjudicate the subject matter. In the rather recent case of *Temple v. United States*, 248 U. S. 121 at 131, it is concluded by the Supreme Court that "The District Court, instead of rendering judgment for the United States, should have dismissed the suit for want of jurisdiction." Many other cases recognize the question as jurisdictional.

There are many cases in which the Supreme Court has had before it and has decided questions as to whether the facts showed a taking within the meaning of the fifth amendment or a consequential injury. A review of them at length does not seem to be necessary for present purposes. The deducing of general principles with reference to a few particular cases should serve our purpose.

From the pioneer case of *Pumpelly v. Green Bay Co.*, 13 Wallace 557, we have in another case deduced the rule that "an actual and continuing invasion of one's property by superinduced water effectually destroying or impairing its usefulness constituted a taking under the Constitution though there be no actual conversion to public use." But it should be added, without necessarily reciting the facts in detail, that in this case the overflow was caused by the erection of a dam across a river which was intended to back up the waters of the river, the result of which, clearly to be anticipated, was to overflow the lands in question.

It is well to bear in mind, in the consideration of this class of cases, that when the United States in carrying on its many activities in aid of navigation, builds dams across rivers, the very purpose of the structures is to back up the waters and create pools above the dams. The pools thus formed sometimes extend several miles up the river, dependent on the height of the dam and the fall of the river, and extend up tributaries also. It is a simple matter of engineering to prolong a level from the crest of the dam up the stream and its tributaries and lands, if any, which are below that level, will of course be overflowed at pool level, and a result so easily ascertainable and so certain to follow is to be regarded as intended. When the Government thus with presumed intention takes the lands of another, the Constitution requiring compensation, the implication of a promise to pay therefor naturally arises. In the *Lynch* case, 188 U. S. 445, the court, reviewing the authorities said, "The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own it does so under

an implied contract that it will pay the value of the property it so appropriates."

In the last-named case in which it was found that there was practically a total destruction of plaintiff's plantation and in which it was held that there was a taking, there was a strong dissenting opinion by the present Chief Justice, concurred in by two Associate Justices which, aside from holding that there was no taking under any construction of the findings, called attention to the fact that the majority of the court had evidently construed the findings as

showing that by the construction of the Government's works
 28 the water had been so backed up in the river as to overflow the embankment protecting plaintiff's lands and thus flood the same. There is at best room for the inference that but for this construction of the findings the conclusion of the majority of the court might have been otherwise, since it is nowhere indicated that this assumed fact was not material to the conclusion reached.

In the Heyward case, 52 C. Cls., 87, involving a plantation adjoining the Lynah plantation and substantially the same facts, this court allowed a recovery, expressly basing its conclusion on the authority of the Lynah case, the Chief Justice stating in a concurring opinion that but for that case his conclusion would have been different. This case, on appeal, was affirmed by an evenly divided court. While the Lynah case, of course, still stands as an authority holding that under the facts shown there was a taking the matters referred to may be proper for consideration as affecting the weight of the authority.

But it is not deemed necessary to review in detail these cases or a number of other well-known cases in which it has been held that there was a taking, some of which have been cited by plaintiff, for it seems to us beyond question, under the facts found, without now referring to them specifically, that the cases before us do not come within any of these cases. Some of them we have considered at length in the opinion of this court and in the concurring opinion of the Chief Justice in *County Court of Marion County, W. Va. v. United States*, 53 C. Cls., 120. We must conclude from plaintiff's briefs that their chief reliance is on the *Cress* case, 243 U. S., 316, and since there is, as it appears to us, a tendency, apparent not only in these but in other cases, to misconstrue the facts upon which the holding in the *Cress* case was predicated, we advert to them briefly.

The facts found by the trial court do not appear in the opinion and it seems not to have been regarded as necessary to state them in great detail. It is shown, however, that the plaintiff in that case was the owner of land on Whiteoak Creek, a tributary of the Cumberland River, and that the United States erected Lock and Dam No. 21 in the Cumberland River and thereby subjected 6.6 acres of plaintiff's land to frequent overflows of water from the river and damaged it to the extent of one-half its value. The dam in question was, of course, below the confluence of Whiteoak Creek with the river, its purpose when in operation must have been, as in all such

cases, to back up the waters of the river and form a "pool" and the further result was necessarily to back up the water in confluent stream within the limits of the pool. In the opinion it is said that the land in question is subject to frequent overflows of water from the river and further, that the findings "render it plain that this is not a case of temporary flooding or of consequential inquiry, but a permanent condition, resulting from the erection of the lock and dam, by which the land is subject to frequent overflows of water from the river," and referring to the principle that "overflowing lands by permanent backwater is a direct invasion amounting to a taking," citing the *Pumpelly* and *Lynah* cases, it is held that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

29 It thus seems clear that the court was considering and deciding as to the effect of backwater caused by the dam in the performance of its usual and intended functions, for, aside from the forced inference from the language used, there is no reference to flood waters.

Some misapprehension may have arisen as to the facts of the case because it appears that the land in question was not continuously overflowed but was subjected to frequent overflows, and it might be contended that if the overflow was the backwater at pool level it would be continuous. Such would be the case with a fixed dam, provided there was water enough in the stream above the dam to maintain a pool. But while we have not the facts we venture the conclusion that the case was dealing with a movable dam.

From the record in other cases presented to this court we know that it was frequently the policy of the Government in erecting dams in streams of the general character of the Cumberland River, to erect movable dams the wickets of which might lay on the bed of the river when not in use and be raised when it was desired to put the dam in operation and fill the pool. In such a case there would be no backwater when the dam was not in operation and lands within pool level would be flooded during such portion of the time as the dam was in operation.

In *Chapman v. United States*, 53 C. Cls. 203, we had for consideration the effect of just such a dam built across one fork of the Big Sandy River and, when in operation, backing the water up a tributary stream. The record showed, and we found as facts the portions of a given year when the dam was and was not in operation, and since it appeared that the dam was in operation and plaintiff's lands within pool level flooded so much of the time during cropping season that they were useless for agricultural purposes, we gave judgment for the plaintiff. There could be no difference in principle between such a case and one dealing with an overflow caused by the backing up of the water by a permanent dam. In one case as well as the other the results were the natural consequence of the Government's structure which, it must be presumed to have anticipated and intended.

The petitions in these cases aver a taking. A form petition intended no doubt for use in each of the group has attached to each what is termed a "bill of particulars" setting up the claim of the particular plaintiff. In No. 32914, Stefano Sanguinetti, the claim is for 40 acres of land at \$500 per acre, "taken by the construction of the Stockton diverting canal," 20 acres at \$1,000 per acre, and residence, barn, outhouses, and other improvements valued at \$16,000. In No. 32901, Richard Russell Smith, the claim is for the value of an undivided one-half interest in Oak Grove ranch, containing 1,750 acres, at \$200 per acre, \$175,000. When the cases were submitted there was attached to the record, in lieu of the original petitions, so-called amended petitions verified May 20, 1919, a date subsequent to the filing of the requests for findings and briefs, which had never in fact been filed in the clerk's office or noted on the docket or in any proper way made a part of the record. Aside from other changes the bills of particulars set up the claims on an entirely different basis. In the Sanguinetti case the claim is for "damage to and impairment in value of house," \$7,500, "damage to and impairment in value of land," \$20,000, and "to one barn destroyed by floods of 1911," \$800. In addition there is a substitution of heirs as parties. In Smith's case, No. 32901, by

30 this so-called amended petition, Nellie Alice Smith, a sister of Richard Russell Smith, and the owner of an undivided one-half of the land, is attempted to be joined as a party plaintiff, although any right of action by her was then clearly barred, and the claim is predicated on "damage done by flood waters of Stockton diverting canal in January to March, 1911, as follows:" Cost of pumping out lowlands, repairs to levees and ditches, restoring buildings damaged, removing debris and noxious weeds, loss of crops and rent money, and depreciation in value of land. But, of course, the original petitions are the only petitions which are properly in the record.

Of the cases under consideration, one, No. 32913, Silva Sanguinetti, is for the taking of personalty and one, No. 31191, Theodore Infalt, is not for consideration on its merits for the reasons stated in Finding XV. The other two, both for the taking of real estate, are illustrations of different conditions prevailing in the area affected, one, the case of Stefano Sanguinetti, involving real estate lying along the diverting canal and in the acute angled junction between the canal and the Calaveras River, and the other, the case of Smith, involving real estate lying some distance to the north of the Calaveras River and not near the canal, which was confluent with the Calaveras on its south side, and east of the Smith land.

The primary purpose of the canal was, of course, to divert the water flowing down Mormon Slough away from the city of Stockton and the lower reaches of the canal in that city, where it formed a part of the city's commercial channel, and empty it into the Calaveras River whence it was to find its outlet. Incidentally there was another condition which it must meet. Eastward and northeastward from the canal and between the Mormon Slough and the Calaveras River was an area $4\frac{1}{2}$ miles wide at the canal, widening a few miles north-eastward to 6 or 7 miles and thence narrowing to a point some 12 or

15 miles northeastward from the canal, with a light descending grade toward the canal. This area, during heavy rains, carried large quantities of water, some falling on the area itself but in larger part due to overflows from the slough and the river along the upper portions of this area, the water flowing, for the most part over the lower portions of the area in depressions or swales but at times flowing over other portions of the land and, before the construction of the canal, temporarily flooding much of this area during heavy rainfall. It is apparent therefore, that the canal, beside carrying the waters of Mormon Slough to the Calaveras must also serve to carry the water flowing over this area to the river.

One of the contentions of plaintiff's counsel, appropriate for reference in this connection, is that it must have been foreseen that "the waters flowing westward during the normal flood season would considerably exceed the capacity of the diverting canal" and why, he asks, if it had not been so foreseen, should the plan include a levee on the south bank of the canal and "where else would it throw the waters except upon the lands of Sanguinetti and the others on the other side of the canal?"

It is shown and found that the flood of 1911 was not "normal" but was unprecedented, unless tradition was correct as to the flood of 1862, 49 years before, at a time when no part of its effects could be charged to the canal, and two preceding high waters in January, 1911, 31 had been cared for by this canal without damage, so far as appears. But aside from that, can the construction of the levee on the southwest bank of the canal with no levee on the northeast bank be construed as indicating a foreseen lack of capacity in the canal and an intention to overflow the Sanguinetti and other lands?

The construction of the levee was a part of the general plan, but why? The canal was approximately $4\frac{1}{2}$ miles long, 150 feet wide on the bottom with necessarily sloping banks and was estimated to require in its construction the excavation of considerably over a million cubic yards of material. It was necessary, in the first place, that there be an accessible dumping ground for this material. To have removed it from the locality would have so aggravated the cost as to probably make it prohibitive. The right of way had been secured of such additional width over the excavation as to permit of its deposit on one of the banks. The effect of its deposit or a part of it in a levee on the northeast bank on the flow of water over the area above described is so apparent as to need no mention. And aside from all this the conditions to be met certainly indicated that a strengthening of the southwest bank of the canal was good construction. A glance at the map referred to in the findings will show that Mormon Slough, where intersected by the canal, ran nearly but slightly south of west. The canal left it at an obtuse angle and ran thence northwest. Its determined direction indicates the obviating of any sharp change of direction at either end. But there was necessarily a change, the result of which would inevitably cause waters rapidly flowing from the slough into and through the canal to impinge on the southwest bank. This effect would be aggravated rather than otherwise by the force of the waters flowing into the

canal from the area between it and the river. The banks of the canal had a slope of one and one-half on one. The top soil was a light adobe 1 to 1½ feet in thickness superimposed on a red sandy clay without rock therein. It should need no argument to show the necessity for the strengthening of this bank even when the volume of water in the canal was yet within its capacity. Under such conditions it may readily be assumed that erosion of the southwest bank would soon permit gradually increasing escape of water over the lands to the southwest toward Stockton even when the water was below the top of the bank on the other side. But aside from these facts the record shows and we have found that the engineers who made the preliminary investigation and recommended the plan, concluded, on the basis of such information as was available, that the canal as recommended would have a greater carrying capacity than would be required for the expected volume of water. And in fact there is nothing in the record showing any conditions during years preceding 1911 which would indicate that their conclusions were wrong. Abnormal conditions following, which they did not anticipate, caused the trouble.

It seems to us quite clear that, independent of the character of the invasion there was no taking of any of the Sanguinetti land, and add to that the necessary conclusion as to the character of the invasion, together with the fact always to be borne in mind, that the land actually devoted to canal purposes was purchased and not taken, and the idea of a taking under the Constitution with an implied promise to pay seems to be absolutely precluded.

32 What of the Sanguinetti land was "taken" by the United States when it constructed the diverting canal as demonstrated by its operation during the flood of 1911? It was covered with water for two or three days but the water subsided at once, except as to low spots where there was no outlet and where presumably surface waters collected and stood until absorbed by the earth, and the land remained to the use of the owner as theretofore. To what extent it had been flooded before we do not know. Water did to some extent at least flow over it, and the construction of the house with its main floor elevated 6 feet might in the absence of other explanation arouse at least a suspicion that even before the construction of the canal, surrounding waters were anticipated. Débris was deposited which required labor to remove. There were small deposits of sand and gravel, but there were also deposits of valuable silt. If ditches were thus filled up it was again but a matter of labor to restore them. Some trees were washed out and destroyed by the waters. They could be replaced by the original process, and indeed many trees were set out on this land after this and following floods. All of these things were a damage to the owner to the extent of the labor and cash expenditures necessary to restore former conditions. And so as to the very old barn, not of sufficient stability to withstand such conditions. The house alleged to have been taken remained as it was before, except as to the front veranda steps, occupied during the flood, never invaded by the water, except as to the cellar or basement, and occupied thereafter. There was as to it, of course, in-

convenience of access during the flood, and if those conditions were apt to repeat themselves there was probably depreciation in value because of inconvenience of access. But depreciation in value by interference with access does not constitute a taking. *Gibson v. United States*, 166 U. S. 269.

And so it may be admitted that if there was apparent danger of a recurrence of serious floods there was a consequent depreciation in value of the land not because it was not there to cultivate just the same but because a recurrence of floods meant necessity for the expenditure of labor and money for purposes indicated above. When depositions were taken in these cases and plots of these lands introduced in evidence it was shown that less of these lands were uncultivated than before the flood of 1911. They were not so productive but it is not shown that they might not have been. Large claims by all these landowners were pending against the United States and it is shown and found that lack of good care, particularly of the fruit trees, was apparent. But however these conditions in the abstract may present themselves, even if, without regard to other necessary elements, results ordinarily to be regarded as damages, pure and simple, might be construed to be a taking of a part of the land because such damages resulted in a depreciation in value, a result always following a damage, at least until it is repaired, there must be further foundation for an action as for a taking under the Constitution.

We may readily assume it to be settled that the basis of such an action in this court is the implied contract arising out of the appropriation of private property by the United States and the Constitutional provision that it shall not be taken without just compensation. In this connection it may be observed that in considering questions of a "taking" under the Constitution the Supreme Court generally resorts to the use of the word "appropriate." While the two words are in a sense synonymous, the use of the word appropriate in relation to governmental acts seem to carry some peculiar significance. It conveys, as the other does not, an idea of the exercise of a sovereign right to appropriate to its own use some specific thing which it needs for its own proper purposes and does not seem to embrace the idea of a fractional depreciation in value by an inflicted damage to something not in fact appropriated. In the *Lynch* case the governmental right in question is distinguished from a proprietary right and is referred to as "its governmental right to appropriate the property of individuals" and is predicated on the right of eminent domain and the principle that all private property is held subject to the necessities of government.

In a concurring opinion in the *Lynch* case Mr. Justice Brown, stating that he saw no reason for holding that there was an implied contract within the meaning of the Tucker Act, expressed the opinion that, irrespective of the question of contract or tort, jurisdiction could be supported under that clause of the Tucker Act which vests this court with jurisdiction of "all claims founded upon the Constitution of the United States or any law of Congress," and that claims founded on the Constitution might be prosecuted in this court "whether sounding in contract or in tort," but such a theory has never been ap-

proved by the Supreme Court as the rule of jurisdiction in this court in this class of cases.

Quoting from many authorities cited in "Words and Phrases," "Implied contracts are such as reason and justice dictate and which the law presumes from the relation and circumstances of the parties" and "An implied contract is one which the law infers from the facts and circumstances of the case," and "Neither an express contract nor one by implication can come into existence unless the parties sustain contract relations, and the difference between the two forms consists in the mode of substantiation and not in the nature of the thing itself," and "To constitute either one there must be that conviction, mutuality of will, and interaction of parties generally expressed, though not very clearly, by the term 'privity.' Without this a contract by implication is quite impossible." And if contract liability is to result from taking of another's property by the United States is it not essential that there must have been an intention to take? The intention, of course, need not be expressed. It may also be a matter of implication. But it must be fairly inferable from all the circumstances. The inference may be justified when the taking by an overflow is the natural, known or easily to be ascertained result of a governmental enterprise. As in the case of a dam across a stream erected to create a pool above, the land, if any, which will be overflowed thereby is easily and accurately to be ascertained and before, by modern engineering methods, as easily as after the erection of the dam, and such a certain, known or easily ascertained result must be presumed to have been intended. But eliminate such conditions and substitute an entirely unanticipated result of an authorized Government work, a result not susceptible of advance ascertainment and perhaps due also to abnormal and unanticipated conditions and there is no room for an implication of intention. And if the implied contract must arise out of the intention, express or implied, to take coupled with constitutional obligation to pay, it must fail for want of an essential element.

34 In the rather recent case of *Temple v. United States*, 248 U. S. 121, the United States, in aid of navigation, had done dredging in the North Branch of the Chicago River in what was supposed to be the natural bed of the river or at least by dedication or in some other manner a part thereof, but where in fact the stream had been widened by the plaintiff's lessee, for his own purposes, by the dredging out of a part of plaintiff's land and submerging it to a considerable depth. The Government in prosecuting its work had no knowledge that it was dredging plaintiff's land. Plaintiff first demanded possession of that part of the submerged land which had formerly constituted a part of his upland and this demand being refused he instituted a suit to recover the value of that which he claimed had been taken by the Government. Here there was a direct invasion of the land in question and the intention was, of course, to do the very physical thing that was done, but the court said, "If the plaintiff can recover it must be upon an implied contract" and, holding it unnecessary to determine whether or not the

Government's claim of a property right in it was well founded, it said:

"The mere fact that the Government then claimed and now claims title in itself and that it denies title in the plaintiff, prevents the court from assuming jurisdiction of the controversy. The law can not imply a promise by the Government to pay for a right over, or interest in, land, which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such the Tucker Act affords no remedy," citing *Hill v. United States*, 149 U. S. 593.

And in concluding the opinion the learned Justice says, "The facts preclude implying a promise to pay. If the Government is wrong in its contention, it has committed a tort."

We are, of course, mindful of the fact that there is no analogy between this case and the instant cases because here we have no question of title or of full knowledge as to title but the underlying principle of the Temple case is applicable here and in all cases of this character. We understand the court to have meant in that case that even though it were established that the property in question was the plaintiff's property and even though there was actual invasion thereof, there was no taking for which compensation could be adjudged and no jurisdiction to determine the controversy because, the Government, believing in its own right, could not have intended to take the property of another, there was therefore no proper basis for the implication of a contract and, equivalent to the same thing, the facts, it is said, precluded implying a promise to pay.

Applying the facts found in these cases, particularly to the Sanguinetti lands, perhaps the strongest case of the whole group and for that reason selected as one of those for trial, we find no basis for any implication of an intention to take, even in the minutest degree, or for any implied contract with reference thereto. Facts found as to intention are specifically to the contrary. There was no purpose by the construction of the dam to back up the waters of a stream. The dam built across Mormon Slough was simply to divert the water into a new channel deemed sufficient for the purpose. The Government sent its agents, through whom it must act, to investigate and
 35 recommend and, based on such data as was available to them, they recommended a canal of dimensions and capacity which they deemed more than sufficient. And but for abnormal, unprecedented floods, their judgment would probably have been vindicated. While the findings refer to the insufficiency in capacity of the canal as an engineering mistake it was not such a mistake as should reflect on them, for in fact they had no warning of the extreme and abnormal conditions to be met. And if any consideration is to be given to the theory that they planned and recommended a canal of known insufficient capacity and by its construction with a levee on one bank thereof they contemplated and intended the overflowing of the San-

guinetti land, may we not wonder why they did not further conserve Government money and energy by building it one-half the width and accomplishing the same purpose? And when they planned the confluence with the river they surely did not intend that the force and volume of the two streams coming together and not finding a sufficiently rapid outlet should back the water onto the Sanguinetti land, for, had such been the intention, they would scarcely have recommended the dredging of the channel of the river below the mouth of the canal to increase its capacity to carry off the combined volume of water.

As to this feature of the situation, the backing up of the water on the Sanguinetti land rather than its overflow from the canal irrespective of its backing up, there was a contributing cause, for which the Government was not responsible, in the bridge or trestle of the Southern Pacific Railroad which crossed the Calaveras River about 500 feet below the mouth of the canal. We can not determine, can only speculate as to how much of resulting conditions were due to this obstruction. Possibly, but for it, the whole volume of water would have found a ready outlet. The findings are that it is not shown directly or inferentially that there was any intention to flood the lands in question or that there was any reason why the engineers in charge should expect or anticipate that such a result would follow. They might have gone further, if an inference in positive form was justified as a finding, and said that the facts and circumstances showed an intention to care for all waters within their intended channels and a well-founded belief that such a result would follow. So far as appears from the record it might reasonably be inferred, if inference as to such a matter was proper or material, that if this canal had been built 40 years before it was it would for all that period have successfully cared for all the water it was required to carry, provided, of course, it had not been permitted to fill up. It happened that this extraordinary flood came the first year after its completion. Subsequent floods, following three years after, approximating but not equaling that of 1911, were aggravated by the fact that the canal had been permitted to fill up by deposits therein and its capacity was thus much reduced. In the case of *Cubbins v. Mississippi River Commission*, 241, U. S. 351, the rule of limitation as to accidental and extraordinary overflows is discussed and is referred to without repetition. It is in attempted avoidance of the rule of this case that plaintiff presents the theory, already sufficiently discussed, that the construction of the levee on the southwest bank of the canal was in contemplation of the foreseen insufficient capacity of the canal and for the intended purpose of throwing the water on the Sanguinetti lands.

36 Plaintiff, in the Sanguinetti case, also discusses the Grizzard case, 219 U. S. 180, using it in support of a theory as to "destruction as a mode of taking" and, if we understand the contention, it is in part that the fact that the right of way for the canal had been bought and paid for is immaterial. In the Grizzard case a strip of plaintiff's land lying on *Tates Creek*, a tributary of the *Kentucky River*, had been submerged and its use for agricultural

purposes destroyed by the erection of a dam across the Kentucky River in aid of navigation. There was no question made as to the right to compensation for the submerged land. The question was as to compensation also for the destruction by the same flooding of an "easement of access" by a public road, running over the submerged land to the Tates Creek pike. Distinguishing authorities "touching an injury to land not taken by the construction of a railroad along and upon a public road," etc., it is said:

"Since, therefore, there has been a taking of a part of the owner's single tract and damage has resulted to the owner's remaining interest by reason of the relation between the taken part and that untaken, or by reason of the use of taken land, the rule applied in the cited cases does not control this case,"

and

"Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted."

Supporting conclusions reached the court cites *Sharp v. United State*, 191 U. S. 341, in which, however, it was held that there could be no assessment of damages as to a separate tract no part of which was taken, and *Bauman v. Ross*, 167, U. S. 548, from which quotation is made holding that "the incidental injury or benefit to the part" (of a parcel of land) "not taking is also to be considered." The infirmity in the *Grizzard* case, if there is any, is in the fact that it is largely rested on the two cases referred to and quoted from which were both proceedings in condemnation. In condemnation the usual rule is no doubt as stated, and we do not question holdings by which we are bound as to its application in the class of cases under consideration, but it is to be observed that if the rule of *Bauman v. Ross* is the rule of this class of cases an assessment of benefits to the remainder of the tract as well as damages is required. But, however that may be, it is apparent that a recovery of damages to the part of a tract not taken is allowed only because of its relation to the part actually taken and because the result of it is in effect a part of that actual taking. There is no analogy in any of the cases under consideration. The lands involved in the *Stefano Sanguinetti* case are parts of tracts out of which the canal right of way was taken but that right of way was bought, conveyed by deed and paid for. In the *Grizzard* case and others like it there was an unquestioned appropriation, "an actual physical invasion," by overflow, of a part of the tract.

The fact of a conveyance suggests another question, not necessary to a determination of the case but proper for consideration.

37 The findings of fact show the procedure in the acquisition of the right of way for the canal. Condemnation was pending against *Stefano Sanguinetti* when, at some stage of the proceedings

not shown, he executed the deed set out in Finding XI, in which the purposes of the grant are fully recited. If the proceedings in condemnation had proceeded to final decree an assessment would have been required, first, of the value of the land taken, and, second, of the incidental damage to the remainder of the tract or tracts, by reason of the taking, including the damage resulting from the use to which the part taken was to be put and including all damages reasonably to be anticipated as a result of the taking and the use. Plaintiff's theory is that an insufficient canal capacity, in times of extreme high water, was foreseen and that a part of the project and a necessary result, evidenced particularly by the construction of the levee on the southwest side, was to cast flood waters on the Sanguinetti lands. While we do not agree with this contention, it must necessarily result that if the theory is correct and if the proceedings in condemnation had proceeded to a finality, such result and damages to the parts of the tracts not taken would have been included or would be deemed to have been included in the condemnation award. A very common exercise of the right of eminent domain by private corporations is the condemnation of rights of way by railroad companies. The juries, usually called to assess the damages, are always instructed as to the elements of damage which they may assess as inuring to the remainder of the tract by reason of the taking and also by reason of the use for railroad purposes of the part taken. Lawsuits against the railroad company by the landowner frequently follow. Sometimes the question arises whether damage complained of is a damage which must be deemed to have been included in the condemnation award, but, that question eliminated, such actions declaring on damages resulting from the construction or operation of the railroad are always actions in tort. We are of the opinion that the deed executed by Sanguinetti, pending condemnation proceedings and so fully expressing the purposes thereof, put him in the same status as if the right of way conveyed had in fact been the subject of condemnation.

But we need not predicate our conclusion on this point, for to us it seems quite clear that this action (Stefano Sanguinetti, No. 32914) cannot be made to rest on an implied contract to pay for any part of or interest in the land in question as for a taking, but is an action in tort of which we have no jurisdiction.

The action of Silva Sanguinetti, No. 32913, is for the alleged taking of growing crops and personal property on the lands involved in the other Sanguinetti case, and the conclusion reached in that case must apply also in this. If this were not the conclusion we might have for consideration the status, in such a case, of growing crops, the fact that he, a tenant, sues for the whole value of the crops alleged to have been destroyed although his tenancy was on the basis of a crop rental, proportions not shown, etc., but the general conclusion, as stated in the case of Stefano Sanguinetti, is sufficient for the purpose and renders other questions of no moment.

As to the case of Smith, No. 32901, it is not necessary to enter into much of detail except to supplement the applicable parts of the discussion in the Stefano Sanguinetti case and differentiate in some re-

spects. The Smith lands in their relation to the canal were radically different. They did not touch the canal, but laid on the north side of the Calaveras River, about a mile and a half north thereof at its nearest point and about two and a half miles, on the opposite side of the river, from the canal. They were low-lands, naturally subject to tidal overflows, were overflowed when acquired by the Smiths, had been reclaimed by reclamation levees, draining, and pumping, and required pumping each year before crops were put in. Further facts as to conditions and what happened during the flood of 1911 are set out in the findings and need not be repeated.

Plaintiff's theory in the Sanguinetti case, and the same counsel appear in both cases, as to the alleged foreseen incapacity of the canal and the intent manifested by the construction of the levee to cast the excess waters on the Sanguinetti lands can have no application, even if conceded to be correct, to the Smith case. The case, it is said, is concerned alone with the flood of 1911, and is predicated on the alleged fact that "the waters of Mormon Slough conveyed through the diverting canal caused the levees on the north side of the Calaveras to break." At least that is the only statement we find in plaintiff's brief as to the cause of the result complained of and perhaps the only statement that could be made. This break occurred on a part of the old levee slightly above and opposite the mouth of the canal and above the portion of the levee which had been strengthened by deposits of materials dredged from the river in the work of increasing its channel capacity from the mouth of the canal down toward the San Joaquin.

To be accurate, it is not found that the waters carried by the canal broke the levee, but facts are found as to the backing up of the waters in the Calaveras by the flow of water from the canal, contributed to by the railroad bridge below, and it is found that as a result of the backing up and embanking of the waters against the levee there was a break. But just how the facts as to the break are stated is probably of slight importance.

Plaintiff then contends that there are but two points in the case; first, the extent of the Smith damage, and, second, the items on which claimants are entitled to recover, following with a discussion of the evidence as to the loss of a barley crop, hay crop, interest in a crop of onions, lost cash rentals, restoring damaged buildings, repairing ditches and levees, pumping out the water, clearing up debris and depreciation in the value of the land "because of the constant menace of the canal," and concludes that there was "(1) a physical taking of claimant's crops and (entire or partial) of his buildings, and (2) a like physical taking to an extent of the naked lands which were actually overflowed, and (3) a taking in the form of diminished value of lands not overflowed." The basis of the claim thus itemized is evidently the bill of particulars attached to the unauthorized amended petition referred to in the earlier part of this opinion and the claim of Nellie Alice Smith, the owner of an undivided one-half interest in the land, is evidently included, although she was never properly made a party to the action, but

so far as the form of the claim of Richard Russell Smith is concerned we can regard it as immaterial to the determination of the merits of the case.

Plaintiff's brief cites to us the Cress and the Grizzard cases, both already referred to, and the Welch case, 217 U. S., 333, and distinguished High Bridge Lumber Co. v. United States, 40 Fed., 738.

39 The Cress case is cited in support of the proposition that the question is "how much less are claimant's lands as a whole worth by reason of the canal and the 'permanent liability' of parts or all of the same to overflow from that cause." In fact, we have not found that there was any such depreciation, but have found that they were sold for a reasonable price and that it is not satisfactorily shown that they could have been sold for any greater price but for this flood and any "impending menace" of floods. But, aside from these findings as to comparative values, we can find in the facts of this case no room for the application of the Cress case except it be, as here, the use of words disconnected from the context and the facts to which they apply. And the Welch case is cited in support of the proposition that—

"It should now be taken as settled that physical contact of any parts of the lands with the flood waters which have occurred in these past years, and which may be apprehended to occur in future years, is not a condition precedent to an award of compensation respecting that acreage; it is sufficient that the estate at large to which those lands belonged has been injuriously affected in some of its parts or appurtenances."

We quote the proposition because it is due the plaintiff that we should fully weigh the arguments and authorities submitted, but the writer must admit his inability either to grasp it or apply it. The Welch case involved the flooding of a part of plaintiff's land by the operation of a dam built across the Kentucky River, the controverted question being as to a recovery also, in that connection, for the taking or cutting off of access to a right of way by the flooding of the intervening strip. We are unable to apply the case to the one under discussion. We have already referred to the holding in the Grizzard case for which we find no application. To be entirely frank about the matter it must be said that plaintiff has failed to point us to any authorities sustaining his view of this case.

The principles hereinbefore discussed as deducible from the well-known authorities cited seem to exclude the idea that there can be any recovery in this case as for a taking. It is going too far to even discuss the idea that the Government, when it constructed this canal, had or by the remotest possibility could be imagined to have had any intention even remotely to be implied as to the flooding of the Smith lands and there seems to us no possibility of erecting an implied contract out of the circumstances of the case. If the United States was, in manner stated, responsible for damage to those lands it was a tort of which we have no jurisdiction.

The Infalt case, No. 31191, is one of the four originally selected for preparation and trial as illustrative of the group and was there-

fore set and taken under submission with the cases already discussed. It might have been dismissed before submission for the reasons stated in Finding XV, if the attention of the court had been called thereto, and for want of prosecution. Such will now be the order with reference to it. If we are right in the conclusions reached in the other cases it would serve no good purpose to give it a separate consideration.

Graham, Judge; Hay, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

40 In the Court of Claims.

VI. JUDGMENT OF THE COURT.

At a Court of Claims held in the City of Washington on the sixteenth day of February, A. D., 1920, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises finds in favor of the defendants, and do- order, adjudge and decree that Stefano Sanguinetti, as aforesaid, shall not have and recover any sum in this action of and from the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered adjudged and decreed that the United States shall have and recover of and from Stefano Sanguinetti, the sum of two hundred and thirty-four dollars and seventy-seven cents (\$234.77), the cost of printing the record in this case in this court, to be collected by the Clerk as provided by law.

By the Court.

VII. HISTORY OF FURTHER PROCEEDINGS.

On April 16, 1920, the plaintiff filed a motion to amend the findings of fact and to set aside the judgment.

On May 24, 1920, the above motion was argued and submitted, and, on June 1, 1920, the motion was overruled by the Court.

On May 28, 1920, the plaintiff presented for filing a motion for leave to file amendment to the petition and to set aside submission in this case and Nos. 32913 and 32901. This motion was overruled by the Court June 7, 1920.

On June 14, 1920, a motion of the heirs for leave to file motion to set aside overruling of motion for new trial was filed and submitted in open court. This motion was overruled by the Court on June 21, 1920.

41 On December 4, 1920, a motion was filed to substitute Jeromina Sanguinetti, adm'x de bonis non of Stefano Sanguinetti, dec'd as claimant.

On December 13, 1920, the Court allowed said motion and filed the following order:

VIII. ORDER SUBSTITUTING PARTIES.

(Filed December 13, 1920.)

Order.

The motion of Jeromina Sanguinetti filed December 4, 1920, came on for consideration by the court, and it appearing that Stefano Sanguinetti, the original plaintiff in said cause, died intestate on or about the 28th day of May 1915, and that the said Jeromina Sanguinetti is the only duly appointed administratrix de bonis non of the estate of Stefano Sanguinetti, deceased, and was appointed as such on June 10, 1919, and the said cause was submitted to the Court of Claims on the 3d day of December 1919, it is now adjudged and ordered by the court as follows:

1. That the said Jeromina Sanguinetti, as administratrix de bonis non of the estate of Stefano Sanguinetti, deceased, be and hereby is substituted as plaintiff in said cause, and this order of substitution is made nunc pro tunc as of the date of the submission of the said cause as aforesaid.

2. That the findings of fact in this and other causes heard together filed on February 16, 1920 (being causes numbered 32914, 32913, 32901 and 31191) be and the same are adopted and reaffirmed as the findings of fact herein.

3. That the conclusion of law in said case No. 32914 (Stefano Sanguinetti) to the effect, "That the case is not within the jurisdiction of the court and should be and is dismissed," is adopted as the conclusion and judgment of the court upon the facts found herein as above stated.

It is further adjudged and ordered by the court that the said cause of Jeromina Sanguinetti as administratrix de bonis non of the estate of Stefano Sanguinetti, deceased, No. 32914, be and the same is dismissed, and that the opinion of the court delivered by Judge Downey in said cause and pronounced February 16, 1920, is adopted as the opinion in said case.

By the Court.

IX. HISTORY OF FURTHER PROCEEDINGS.

On February 10, 1921, the plaintiff presented for filing a motion to set aside judgment and to admit new pleadings, and motion to amend findings and motion to file new pleadings.

On February 14, 1921, the Court overruled said motions and filed the following order:

X. ORDER OF COURT.

(Filed February 14, 1921.)

Order.

The plaintiff having presented for filing in the clerk's office a motion to set aside judgment in this case and to admit new pleadings, and a motion to amend findings, and a motion to file new petition, the court allows each of said motions to be received and filed; and considering them as filed the court overrules each of the said several motions.

By the Court.

XI. PLAINTIFF'S APPLICATION FOR AND ALLOWANCE OF AN APPEAL.

Claimant shows to the court that this suit involves more than three thousand dollars (\$3,000.00); that by a judgment of the court rendered on the 13th day of December 1920, claimant was substituted in the stead of Stefano Sanguinetti, her decedent, who was the original claimant, but denying her the right to file a petition or other pleading and dismissing the suit; that thereupon, in less than sixty days after said December 13th, she filed a motion to set aside said judgment and for leave to, as preliminary to the entry of any judgment against, or concerning her, to file her petition and request for findings of fact, and that on the 14th day of February 1921 the court denied said motion. The claimant hereby applies for
 43 an appeal from said judgment of this court to the Supreme Court of the United States. Benj. Carter, Attorney for Claimant.

Filed May 4, 1921.

Ordered: That the above appeal be allowed as prayed for. By the Court. May 23, 1921.

Court of Claims.

[Title omitted.]

CLERK'S CERTIFICATE.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission and case; of the findings of fact, conclusions of law and opinion of the court by Downey, J.; of the judgment of the court; of the orders filed by the court; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City this seventeenth day of June, A. D., 1921. F. C. Kleinschmidt, Assistant Clerk Court of Claims. [Seal Court of Claims, Reipublicæ Civibisque.]

Endorsed on cover: File No. 29,184. Court of Claims. Term No. 130. Stefano Sanguinetti, appellant, vs. The United States. Filed October 2nd, 1922. File No. 29,184.

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IN THE
Supreme Court of the United States

October Term, 1923.

STEFANO SANGUINETTI, *Appellant*, }
v. } No. 130.
THE UNITED STATES.

BRIEF FOR APPELLANT.

This suit is a result of the Government's undertaking, by a canal and embankment, to control flood waters in the region of Stockton, California, so as to improve navigation of Stockton River.

The Calaveras River, having a drainage area of about 491 square miles, rises in the foothills of the Sierra Nevada Mountains, to the northeast of Stockton, and flowing in a southwesterly direction passes north of that city and empties into the San Joaquin River about two and one-half miles below the mouth of a channel, known as Stockton Channel, some two and one-half miles in length and 150 feet wide, which connects the city directly with the San Joaquin River, a tidal stream flowing into San Francisco Bay; Stockton being a commercial and manufacturing city of, at that time, about 27,000 inhabitants. It is the upper terminal of the greater part of the commerce of the San Joaquin River. Its water-borne commerce amounted to approximately 500,000 tons annually, valued at about \$30,000,000. For many years, beginning in 1885, the Government had been attempting to maintain by

dredging, with only partial success, a depth of nine feet at low water in Stockton Channel, the average annual expense incurred being over \$7,000 (House Document 256, 65th Congress, 1st Session). At Bellato, about fifteen miles northeast of Stockton, the Calaveras River divides, so that when the water in its bed reaches a sufficient height, the greater part is diverted to the south, through what is known as Mormon Slough. This latter also flows in a generally southwestern direction and up to the winter of 1910-1911 had flowed through the city of Stockton and into said Stockton Channel, the mouth of Mormon Slough, there called Mormon Channel, being near the head of Stockton Channel. In the lower twenty miles of its length the fall of said Mormon Slough, and the slope of the adjacent country flattens, to an average grade of five and one-half feet to the mile, to the west, and in periods of high water is heavily charged with sediment. Prior to the construction of the diverting canal hereinafter referred to the greater part of this sediment was dropped into Mormon Channel at and near its mouth at Stockton, and that sediment which got past its mouth was dropped in Stockton Channel, to the detriment of navigation. The lands directly to the north of the Calaveras River and extending back several miles are what are known as tule lands, that is to say, low lands, reclaimed and protected by dikes or levees. Prior to the construction of the diverting canal neither the land to the north of this river nor the land to the south thereof, and between the river and said Mormon Slough, had ever been subject to injurious overflow by the flood waters of either, or from any other cause; and much of the lands, particularly those hereinafter mentioned, had been for many years under intensive and successful cultivation.

In the years 1903 to 1910, under a direction contained

in the River and Harbor Appropriation Act approved June 13, 1902 (32 Stats. L., Ch. 1079, p. 368), the Corps of Engineers of the War Department, at a point about three and one-half miles east of Stockton, built a dam across Mormon Slough and dug a canal about one hundred and fifty feet wide, seven and nine-tenths feet in depth and about four and one-half miles in length, running in a northwesterly direction from Mormon Slough to the Calaveras River, the purpose being to divert the waters of Mormon Slough to the Calaveras River, so that they would pass into the San Joaquin River below the mouth of Stockton Channel and thus prevent the filling up of said channel and save the cost of dredging it (H. Doc. 256, p. 7). Following is the text of that enactment:

“For the rectification of the Stockton and Mormon channels at and near the city of Stockton, California, by the construction of a canal to divert the waters of the Mormon channel into Calaveras River in accordance with the report submitted in House Document numbered 152, Fifty-fifth Congress, third session, fifty thousand dollars: Provided, That a contract or contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete said project not to exceed in the aggregate \$175,000 exclusive of the amounts herein and heretofore appropriated. Provided further, That the City of Stockton or the State of California shall first furnish to the United States the right of way for said canal” (32 Stats., Part 1, p. 368).

In designing this improvement the army engineers deliberated between two plans. One of these was to lay the canal so wide and dig it so deep that it would contain all the waters of any flood deemed possible. The other plan was to make the canal smaller, so as to take

care of the ordinary spring floods and to supplement it by a levee, on its southwest side, of height and strength sufficient to stop the waters of extraordinary floods and throw them back, across the canal, to the low lands on the other side. The decision was in favor of the latter scheme. A comparatively shallow canal was excavated and the levee built, largely of the material so obtained. The project provided for four highway bridges, crossing the canal, and the elevation of those, with their approaches, was adjusted to the height of the levee. Besides, there was a railroad bridge to be considered, and this was raised by the Government force to such height so as to clear the levee.

A dam, practically a continuation of this levee, at its eastern end, was built across Mormon Slough so as to shut the waters out of the latter and turn them into the canal. To accommodate the flow of the diverted and collected water, with its detritus, the Calaveras River was dredged below the mouth of the canal and the dredged materials were used to widen, raise and strengthen a levee a short distance down the river from that point along the north bank.

The diverting canal with its levee had precisely the effects intended by the army engineers. At times of normal floods it caught the waters which otherwise would have continued to flow onward to Stockton and conducted them directly to the Calaveras River; and in 1911, when the waters exceeded the capacity of the canal and, flowing against the levee, were thrown back across the canal, they rested for the time being upon the farming lands here concerned.

The Solicitor General, already having filed his brief in this court, has thought it worth while to say in the first sentence that this is one of seventy suits originating in the overflows of 1911, involving more than \$500,000.

The reasons for the selection of this as a test case are that it relates to lands which abut immediately on the diverting canal and therefore afford the clearest exemplification of the change in the waterflow, and that the damages in suit are of a larger variety than those of any other case, and a decision herein will settle most of the other cases. Also—whatever relevance the fact may have—the other suits, as proved, are comparatively insignificant in amount. Their combined total is not much more than the claimant in this case can recover; the parties being mainly tenant farmers whose growing crops were destroyed or injured.

Appellant had some one hundred and forty acres of land south of the canal and levee, but north of the latter he had two tracts aggregating about sixty acres, these latter being ~~in two tracts~~ one hundred feet apart. On the tract lying in the angle indicated there was a two-story residence, with two barns and other outbuildings, and both tracts were in a high state of cultivation, bearing crops, more or less near to maturity, when the most serious of the 1911 floods occurred. All these properties were in a large degree destroyed, or damaged, by that overflow. The growing crops belonged to tenants of claimant, and therefore this suit is confined to injury to the forty acres of the lands, an orchard occupying the twenty remaining acres, and the residence and other buildings.

Assignment of Errors.

Error, committed by the Court of Claims, is assigned hereby as follows:

1. Dismissing the case for want of jurisdiction in the court.
2. Not finding that the United States was and is responsible to appellant for the proved injuries to his property.

3. Not finding that the overflow of appellant's lands, by which the injuries sued on were done, was a proximate and natural effect, for which the United States engineers in charge planned, of the project in question, including a levee along the southern bank of the diverting canal to control the high waters, above the average, which were expected to occur.

4. Not rendering a judgment in appellant's favor.

Propositions.

1. The Government, being seized of a right of way for the diverting canal and levee described in the record, its construction of the same, under general direction of Congress, in such form as necessarily and proximately to damage attingent property, is a taking of that property for public use.

2. If said canal and levee were intentionally coordinated by the authorized officers of the Government with respect (a) to the capacity of the canal and (b) to the position and height of the levee, so that the levee, in cases of very high water expected by the designers, caused the waters to overflow and damage lands on the other side of the canal, the Government is answerable to the land owners for the damage.

3. The War Department having been directed by Congress to construct the improvement in question, a plan for such improvement, framed by the authorized officers of that department of the Government, is the Government's plan.

4. This improvement having been constructed on the plans of the Government's authorized engineers, there is no question here of good or bad engineering, and for any consequences, inherent in the plan, the Government is liable to persons proximately injured thereby.

5. It is the character of an invasion of property

caused by the Government, not the amount of damage resulting from it, in case that damage is substantial, that determines the question whether it is a taking.

(*United States v. Cress*, 243 U. S. 328. *United States v. Lynah*, 188 U. S. 445. *Heywood's case*, 46 Ct. Cl. 488 and 52 Ct. Cl. 87; 250 U. S., 633.)

6. The effect on appellant's lands of the levee, adjusted to a height of water that occurred the next year after the completion of the improvement, viz., 1911, and again in 1914 (in which year this suit was instituted), and might well have occurred in 1912 and 1913 if those had not been unusually dry seasons, is not a case of temporary flooding or of consequential injury, but a permanent condition.

(*United States v. Cress sup.*, p. 327. *Chapman's case*, 33 Ct. Cl. 203. Present record: Findings of fact, p. 10; Opinion of Court of Claims, p. 27.)

Argument.

This case could not better be put at issue than by comment on a few expressions in the Government's brief.

At page 7 of the brief it is said:

"If the Government engineers failed to take into account the possibility of unusual spring floods, at worst their lack of foresight could only amount to engineering errors or negligence, and the United States is immune from suit by reason of damages due to such error or even negligence.

Firstly, the engineers did take into account the certainty of floods, year by year, of varying heights, and they made provision for all heights, viz., (1) the canal alone for comparatively low waters and (2) the levee for those which would overflow the canal. Secondly, there was no engineering error or negligence; the levee

did precisely what was expected of it; when the waters, from excessive volume, were flowing to the southwest, it threw them back across the canal, onto the lands of appellant and others, and by so doing prevented the submergence of lands extending to Stockton and the drowning and shoaling of Stockton Channel.

Brief, p. 8. "Undoubtedly, when the United States appropriates property for public purposes an implication arises of a contract to pay for the lands thus *intentionally and deliberately* taken."

In the present suit the United States is called on to pay for precisely the thing indicated by the Solicitor General's italics.

Brief, p. 9. "Where, however, the act is due to conditions over which the United States has no control, then there is no ground for the implication [of a promise to pay], even though the Government in its operations may have been a contributory cause."

The Government, in fact, exercised full control over the flood waters. It caused them to flow directly through the diverting canal to the Calaveras River when they were not very high and, when they were very high, to encounter and be arrested by the levee, with the inevitable result of being deposited on the lands beyond the canal.

Extract from findings of fact, brief pp. 13, 14.
 "The waters flowing in the slough in great volume and to its capacity were diverted by the dam [connecting Mormon Slough with the diverting canal] into the canal except as to some overflow which passed on toward Stockton, and the large volume of water flowing over the country between the slough and the Calaveras was intercepted by the [diverting] canal and the aggregate volume turned

toward the Calaveras, but the volume was in excess of the capacity of the canal and also, when combined with the waters in the Calaveras, in excess of the quantity which could find a ready and rapid outlet down that stream, with the result that, by reason of the excess quantity of water reaching the canal and the retarding of its flow by the waters in the Calaveras, and also, to some extent, by the bridges over the canal, the lands above or to the northeastward of the canal and for the full length thereof were overflowed, the overflow extending in varying depths from one-half to 1 mile, according to the contour of the land, the greatest distance and depth occurring in the pocket formed by the canal levee and the levee on the north bank of the Calaveras, where a lake was formed. The waters flowing in and parallel with the canal, moving in greater volume and with greater force than those in the Calaveras, threw the current of the river to the levee on the north bank and backed up the waters of the Calaveras to the northeast."

The mere physics of the canal overflow, of the stoppage of occasional waters by the levee below the canal and of the submergence of the lands to the northward thereof, are of no consequence provided those particular results were foreseen by the army engineers and the plan was adjusted to them. It is clear that the engineers did expect that practically all of the waters, at any stages, would be turned out of Mormon Channel into the diverting canal and that at times the volume, at and below the mouth of the canal, might be more than the Calaveras River could carry; which latter eventuality was the reason for the building up and strengthening of the old levee, described in the findings, on the north bank of the river. In short, the engineers took into account everything that would contribute to create a height of water, along the diverting canal, for

which the canal itself would be inadequate. Naturally, they built the levee to a height that would take care of the overloads which were expected to occur sometimes in the actual conditions which would obtain upon the completion of the project.

The findings, as quoted in the Government's brief (pp. 14-16), go on to tell of breaks in the levee on the Calaveras River bank, one of them above or opposite the mouth of the canal, and of back water, on the other side of the river, caused partly by an embankment of the Southern Pacific railroad and that low-lying lands for a considerable distance both above and below this break were flooded. Possibly the Government's engineers, taking the Southern Pacific embankment into account, anticipated that an overflow might occur below the mouth of the canal involving a breakage of the levee on the river bank; but certain it is that they computed the levee on the south bank of the canal of strength and height to restrain those particular floods, with the others, so that, along the line of the canal, not a drop of water would pass onward to or toward the city of Stockton, but all would be imposed on the lands along the northeast bank of the canal. Elsewhere the findings say the plan as a whole, including the repaired dam along the river front, contemplated that "the water flowing over this area which otherwise would have continued on toward Stockton should be intercepted by the canal and thus diverted to the Calaveras" (Rec. p. 9); and however much these waters were, and in whatsoever ways assembled, they, after overflowing the canal, did encounter the levee built to receive them and necessarily to drive them back upon the lands opposite, where they would remain until the canal and the river, through the subsidence within the banks, could receive them.

Also, in speaking of the work done on the lower reaches of the river, the findings say (Rec. p. 8):

"In dredging the Calaveras below the mouth of the canal to increase the capacity of the river and care for the increased flow of water the dredged materials were placed on this levee up to a point a short distance above the mouth of the canal, and it was thereby very much widened and raised and strengthened. It was not made of such width and height as it was because of assumed necessity for so much strengthening, but because of the excess quantity of materials to be disposed of."

The case at bar has no concern whatever with the protective works on or in the Calaveras River and their sufficiency or insufficiency. (Some of the other cases have.) The sole subject of complaint here is, or was intended to be, that an ample embankment was constructed along the south bank of the diverting canal, as the final agency in the engineers' plan "for the rectification of the Stockton and Mormon Channels" and that it accomplished its purpose by stopping all the waters that, through one course or another, came within its influence and deposited them on the lands of this appellant and some others.

In describing this plan, as adopted, Assistant Engineer L. C. Eaton, who was its author and who was to have charge of the construction, said (Report of Chief of Engineers for 1899, Part 4, pp. 3192, 3193):

"From elevations taken of high-water shown me by residents in the vicinity it would appear that the whole country is flooded in extreme high waters. To control this water, the material excavated from the channel can be placed on the lower side to form a levee. This will require raising the grade of the Stockton and Copperopolis railroad 4.5 feet at least to bring it up to the high water mark. The line of the proposed Lodi railroad crosses the canal at two

points. I do not know what their proposed grade is * * *.

"The proposed line begins at a point on Mormon Slough, on the ranch of James Gilliss, runs 73 degrees 30 minutes, west magnetic, 16,500 feet to a point near the Waterloo road; then deflects 5 degrees 30 minutes left, runs 8350 feet, and strikes the Calaveras River at the highway on the ranch of S. Sanguinetti. This location avoids all improvements except about 1030 feet of vineyard and orchard on the Sanguinetti place which can not well be avoided. It will require the construction of a trestle crossing the canal for the Stockton and Copperopolis railroad and perhaps also for the Lodi railroad; also the construction of four high bridges and the lengthening of the one at the lower end of the line, which is a new bridge. * * *

Major Heuer, the district engineer, in his report of the same time, said (ib. p. 3191), referring to Lieutenant Eaton's report and a tracing which accompanied it:

"In making the canal all the excavated material should be made into a levee on the west side of the canal. In enlarging the north branch of the Calaveras River the mass of the excavated material should be thrown on the south side of the river, with a view of forming a high levee between the river and the city. The proposed location of the diverting canal is governed by engineering and economical considerations."

Seven years later, in 1905, Colonel Heuer, in a California court, regarding this same improvement, testified that while depositories had to be found for the excavated matter it was unnecessary to build so much of that into a levee on the west side of the canal. "We did that," he says, "first to prevent the city from being flooded." (Hos. Doc. 256, sup., p. 29.) This testimony related entirely to the water and detritus diverted from Mormon Channel.

Colonel Heuer and some other engineers speak of the banks of the diverting canal indifferently as (1) "east" and "west" and (2) "north" and "south." All meant the same thing; the canal running considerably west of north, counting from Mormon Slough, and meeting the Calaveras River at a broad obtuse angle.

In the fall of the same year, 1911, in which the first overflow of the canal occurred, the local engineer officer in charge, in his report, said (Report of Chief of Engineers for 1911, Pt. 3, pp. 2560, 2561):

"This canal was given a severe test during the early part of this year, when a succession of floods caused unusually high water several times, but the levee on the lower side of the canal proved ample to withstand all water turned into the canal. * * *

The country to the east and north of the canal was flooded for several miles and damage was done to early crops, fences and buildings.

* * * This canal, however, does not entirely fulfill the purpose of the project to keep material out of Stockton Channel. The south bank of Mormon Slough above the head of the canal is overflowed at high water and considerable quantities of detritus are carried down into the improved channel in Mormon Slough and will doubtless extend into Stockton Channel in the course of time. This had been foreseen and the city of Stockton and private owners informed. The diverting canal and levees protected the city of Stockton from being flooded two or three times during the rainy season."

The report on the "preliminary examination" of Stockton and Mormon channels, having in view the betterment of the protective works here in question, which is included in the report of the Board of Engineers printed in House Document 256, 63d Congress, 1st Session, speaks throughout of the flooding of lands, to the northeast of the diverting canal and its levee, which

occurred in 1911 and was anticipated to recur if the waters should rise so high again. It would not be correct to say that the levee, jointly with canal, caused the overflows in that area. These were caused ultimately by the levee alone, for the water already had overflowed the canal and but for the levee would have passed onward toward the city of Stockton, just as all the flood waters had done previously, and the levee was constructed to be a last and full defense of the country beyond, which could not be accomplished except by throwing the water onto the lands lying above the canal. Regarding the events of 1911, this report said (page 10):

"The diverting canal therefore practically accomplished its purpose, as far as the United States is concerned, and it may be expected to prevent the deposit of silt in Mormon and Stockton Channels, except in times of extreme flood, when the water escapes over the south bank of Mormon Slough and so flanks the dam and embankment."

The embankment (levee) was not put there aimlessly; it had its own purpose and this purpose it accomplished when it was not flanked by waters which had not entered the canal.

Those decided cases alone which are cited by the Court of Claims in its opinion and on the brief of the Solicitor General, when correctly interpreted, clearly sustain the right of the present appellant to be compensated for the taking of his farm and appurtenances by flooding. The Court of Claims pretty well cleared the way for appellant's argument when it quoted the case of *Pumpelly v. Green Bay Co.*, 13 Wallace, 557, and said: "The overflow was caused by the erection of a dam across a river which was intended to back up the waters of the river, the result of which, clearly to be anticipated, was to overflow the lands in question." Surely it is not material that the purpose of the levee

in this case was to stop and throw back, instead of to back up, the waters; and the resulting overflow was no more anticipated in that case than in the case at bar.

In Lynah's case, 188 U. S. 445, a plantation had been flooded by seepage and percolation through an embankment built for the sole purpose of raising the level of the water in the river on which it abutted. This court (notwithstanding that the Government's engineers had not anticipated this seepage as one of the effects of the project) said the case was not essentially different from *Pumpelly v. Green Bay Co.* and overruled the decision of the Court of Claims which absolved the Government from liability.

The Court of Claims, for all that it charges appellant with "a tendency" to misconstrue the facts of Cress's case, 243 U. S. 316, itself says that the injury, redressed by the opinion of this court, was "a permanent condition, resulting from the erection of the lock and dam, by which the land is subject to frequent overflows of *water from the river*" and it takes note of this court's quotation from the *Pumpelly* and *Lynah* cases: "It is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

Appellant has no need to ask any different interpretation of the Cress case. It is only to be added, with reference to the paragraph at the top of page 22 of the opinion (Rec. p. 27) that "the effect of backwater caused by the dam in its usual and intended functions" is the matter at issue here as in the other case, the sole difference being that the function by which Sanguinetti was injured was occasional, while that of which Cress complained was constant.

The following extract from page 327 of the opinion of this court in the Cress case, having reference also to

the Lynah case and others, disposes of some other cases to which the opinion of the Court of Claims and the brief of the Solicitor General herein refer:

“These cases have no proper relation to cases such as *Gibson v. United States*, 166 U. S. 269, where no water was thrown back on claimant's land, and the damage was confined to an interference with the access thence to the navigable portion of the river; *Scranton v. Wheeler*, 179 U. S. 141, 153, which likewise had to do with the interruption of access from riparian land to a navigable channel; *Bedford v. United States*, 192 U. S. 217, 225, where the damage to claimant's land resulted from operations conducted by the Government six miles farther up the river; *Jackson v. United States*, 230 U. S. 1, 23, where owners of lands on the east bank of the Mississippi claimed compensation as for a taking of their property by reason of the effect of levees built on the west bank opposite their lands as a part of a system of levees designed to prevent crevasses, retain the water in the river, and thus improve the navigation. In each of these, there was no direct invasion of the lands of the claimants, the damages were altogether consequential, and the right to compensation was denied on that ground.”

Another case of seepage is *Horstmann Co. v. United States*, 257 U. S. 138, from which the Solicitor General quotes at pages 24 and 25 of his brief. The land in question was some miles distant from the reservoir from which the water percolated. This court said:

“That the result of the Government's work to the properties of plaintiffs could not have been foreseen or foretold is a necessary deduction from the findings of the Court of Claims. The court found that there is obscurity in the movement of percolating waters, and that there was no evidence to remove it in the present case, and necessarily there

could not have been foresight of their destination nor purpose to appropriate the properties."

In the instant case there necessarily was foresight as to the destination of the waters that would overflow the canal, and the purpose to avail of that destination, viz., the lands immediately north of the canal, is evident.

The court also said: "It would border on the extreme to say that the Government *intended* a taking by that which no human knowledge could even predict." Conversely, it would border on the ridiculous to say that the Government did *not* intend a taking by that very event which was foreseen and against which a special provision was made in the plan of the improvement.

If complaint were made here of the canal as the cause of the overflow north thereof, the Solicitor General's characterization of the canal as only contributory might be pertinent. His observation is *not* applicable to the factor of the project to which the injury really is charged, viz., the levee.

The Solicitor General (page 9) gives a rather hesitating assent to the conclusion of the Court of Claims that the correlated canal and levee were an engineering mistake. We respectfully submit that, as matter of law, there can be no mistake in a project which engineers of the United States have framed to meet conditions that actually existed or were expected to occur, whether permanently or at intervals. In other words, we believe we speak within bounds when we say that if the best engineers in the country, by dozens or hundreds, had testified in this case and said e. g. that the canal ought to have been made larger, so that it could not be overflowed, and the abutting lands injured, by any floods conceived of as possible, this would have been immaterial. (In fact there was no evidence.)

The only matter of any pertinence regarding the plan of the work is that it actually included, as an integral part, that particular structure which, in the situation contemplated, produced that effect of which the suit complains.

In reality, of course, the levee was wisely designed as protection of navigation in the Stockton Canal, and incidentally, of the city of Stockton itself. The only inadequacy of the project, if there were one, was in the omission of an embankment at the lower end of Mormon Slough sufficient to force all the water into the diverting canal and prevent any drift whatever to the south thereof. This, obviously, was not a function of the levee, which was coterminous with the canal. If the true function of the levee had not been performed—if the overflow from the canal itself had not been forced onto the lands on its north shore—this suit would never have arisen.

Naturally the Solicitor General has nothing to say of *Portsmouth Land & Hotel Company v. United States*, 260 U. S. 327, which is the last word of this court regarding diminished value of lands on the seashore caused by the actual or expected firing of guns from a Government proving ground on which the lands abutted. Two judgments in the same matter had previously been rendered by the Court of Claims, one against the same suitor and one against another, and both were affirmed by this court. In the case cited a demurrer was sustained by the Court of Claims and the petition dismissed. This court reversed that decision, saying in part:

“The installation of a battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between it and the sea to the right and privilege of the

Government to fire projectiles directly across it for the purpose of protection or otherwise whenever it saw fit in time of peace with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation must be made." Also:

"Where acts amount to the taking of a servitude, an implied contract might be inferred."

The Findings of Fact.

The Solicitor General, mainly by a liberal interpolation of italics, constructs his argument, in section II (pp. 10-18), on certain parts of the findings made by the Court of Claims. Following are those parts with our brief comments:

1. That "floods were and are of almost annual occurrence;" but that "the cause of the damage here in question was "an unprecedented flood, unless the flood of 1862 may have been greater, as tradition has it." (Brief pp. 12, 13.)

Clearer proof could hardly be desired of the engineers' cognizance of probable high waters, exceeding the capacity of the canal, and their selection of a levee as the best means of restraining and disposing of this overflow.

2. Waters of the Calaveras River, in part backed up by the bridge or trestle of the Southern Pacific Railroad. (P. 14)

This bridge and trestle, while not those of which we have spoken above, were a datum of the engineers' plan and doubtless were considered when the height and strength of the levee were fixed. The agency of the levee in forcing the waters to the north side of the canal is not the less evident because, practically, it sufficed to

handle in that way all of the overflow waters, from whatever sources. In reality the flood waters of the Calaveras River flowed mainly to the south of the stream and, including, as they did, some water brought to the river by the canal, relieved the levee to that extent of pressure from the canal overflow.

3. That "to what extent these waters in 1911 would have accumulated on, flooded, or damaged these lands but for the canal does not specifically appear and is speculative." (P. 16.)

The ample extent to which these waters in 1911 *were* accumulated by the levee on these lands is not speculative and does clearly appear. All else is negligible.

4. That "it is not shown either directly or inferentially that the United States or any of its officers acting for or in their behalf, in the preparation of the plans for the diverting canal or in its construction had any intention to thereby flood any of the lands here involved or had any reason to expect or anticipate that such results would follow." * * *

That "the engineers of the United States reached the conclusion based on such information as they had, that the canal as proposed would have a greater capacity than would be required for the expected volume of water to be carried and that the Calaveras River below the mouth of the canal, when dredged as recommended, would have a capacity considerably in excess of the combined volume of water to be carried by it. The canal was constructed as recommended by the Government engineers." (Pp. 18-19.)

This means, as to each of the matters referred to, that there was no proof of any kind before the court. If there had been any proof, the court would have had to make a finding to the one effect or the other, e. g., that the officers of the United States "had no intention to thereby flood any of the lands here involved or any

reason to expect or anticipate that such results would follow," or that "the officers of the United States intended to thereby flood the lands here involved, when that necessity should arise, and had reason to expect or anticipate such results"; and the court will not be presumed to have abdicated its duty.

The only evidence that exists on these points, so far as we know, is in the successive reports of the army engineers. By a motion of claimant these reports were brought directly to the attention of the court, but the court refused to consider them. The fact that these reports were the only competent evidence, and therefore that the court had no evidence on which to base its finding, will be shown by a motion of appellant for a remand.

There is now before this court, in this form of engineering reports, sufficient evidence, we submit, to show that the levee in question was, and was considered by the engineers to be, an integral part of their plan and that they did anticipate, as probable, occasional overflows which, for accomplishment of their object, would require such a structure. This being true, and the court being assured that there is no countervailing evidence, it will give to those evidences their proper effect, notwithstanding that the Court of Claims has reached a different conclusion. This rule of law, with the corollary that a finding of the Court of Claims for which it is shown that there is no legal evidence has no sanctity, was set up in *Clark's case*, 96 U. S. 37, and obtains with full force to this day. In the following cases the same rule was declared, with another, viz., that where a conclusion of law as to a Federal right and findings of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the facts to the

extent necessary to do so, the power exists as a necessary incident upon the claim of the denial of a Federal right: *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 635; *Oregon R. R. Co., etc. v. Fairchild*, 224 U. S. 528; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601; *Carlson v. Curtis*, 234 U. S. 103.

"Denial of a Federal right" is a jurisdictional question; but so is the question of implied contract in the instant case.

The opinion of the Court of Claims (Rec. p. 29) says: "The conditions to be met certainly indicated that a strengthening of the southwest bank of the canal was good construction." Indicated to whom? To the Government's engineers, planning the improvement, of course. So thought *was* given to this levee and it was deliberately made a part of the plan.

It does not seem possible, however, that the intended function of the levee was that which the court has here suggested. The layman's guess is that such a load, not placed against the face of an embankment but superimposed on its top, rather weakens than strengthens it.

After hypothesizing some earlier time for the construction of the canal and levee, the Court of Claims (Rec. p. 34) says:

"It happened that this extraordinary flood came the first year after its completion. Subsequent floods, following three years after, approximating but not equaling that of 1911, were aggravated by the fact that the canal had been permitted to fill up by deposits therein and its capacity was thus much reduced."

This case has nothing whatever to do with excessive floods subsequent to 1911, and their frequency, except as evidence of the engineers' foresight and purpose in

constructing the levee. Compensation is sought for the damage done by the floods of 1911 and none other.

The Pleadings.

Although the arguments of the Court of Claims and the Solicitor General profess to take into account all of the pertinent facts, both point out the inadequacy of the petition. That the petition failed to describe the damage, and its cause, with due particularity, and in other respects was not mature, when the case was submitted, we cannot gainsay. But this, we say, is not chargeable to appellant or his counsel. That leave to file a proper petition, in the name of any claimant or claimants whomsoever, after the facts of the injuries were established, and leave to this claimant to file any petition whatever, were denied by the court when the occasion arose, will be shown by a motion seeking either that the petition in the record be considered as containing certain necessary averments or that the case be remanded to the Court of Claims with directions to permit the filing of a new petition.

BENJ. CARTER,
Attorney for Appellant.

F. CARTER POPE,
Of Counsel.

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TREASURY

No. 130

In the Supreme Court of the United States

October Term, 1931

STEFANO BARBIVIERI, APPELLANT

vs.
THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1931

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

STEFANO SANGUINETTI, APPELLANT,	} No. 130.
v.	
THE UNITED STATES.	

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This is one of a group of seventy claims, whose aggregate amount exceeds \$500,000 (Finding VII), in which the plaintiffs seek to compel the United States to pay damages for injuries which their property sustained by reason of floods, due to excessive and unusual rainfall. It is an attempt to convert an "Act of God" into a fictitious "taking" by the United States Government of plaintiff's lands. The alleged "taking" and the resultant implied contract to compensate for such "taking" are claimed to result from the fact that the Calaveras River, in California, on several occasions overflowed a canal constructed by the United States, due to abnormal and almost unprecedented rainfalls, and thus temporarily submerged the plaintiff's lands.

Little, if anything, could be added to the very able opinion of the Court of Claims, which seems to me

to vindicate fully its conclusions. The Government could profitably rest its case upon that opinion.

I.

INSUFFICIENCY OF THE PETITION.

Preliminarily we suggest that the case could well have been dismissed upon the plaintiff's petition, for it wholly fails to make any averments which would give rise to an implied contract on the part of the Government to compensate the plaintiff for the temporary injury that he sustained through the excessive rainfall. If this be so, this Court would be relieved of examining the exhaustive findings of fact of the Court of Claims and can sustain the judgment entered by it, because the plaintiff was unable to state a case which was even within the jurisdiction of the Court of Claims.

The petition, after averring that the Calaveras River rises in the foothills of the mountains to the northeast of the City of Stockton, alleges (R. 1, 2, and 3):

III.

Both the Calaveras River and the Mormon Slough *have always been subject to flood stages from the rains and melting snows in the mountains*, and the effect of said flood waters was to inundate, or subject to inundation, annually a portion of the city of Stockton with the waters of Mormon Slough, but the lands hereinafter described were never submerged nor subject to submergence by said water-courses in the flood stages.

IV.

For the purpose of relieving the city of Stockton from the conditions described by the last preceding paragraph, Congress, by the Rivers and Harbor appropriation act approved June 13, 1902, provided as follows:

"For the rectification of the Stockton and Mormon channels at and near the city of Stockton, California, by the construction of a canal to divert the waters of the Mormon channel into Calaveras River in accordance with the report submitted in House Document numbered 152, Fifty-fifth Congress, third session, fifty thousand dollars: *Provided*, That a contract or contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete said project not to exceed in the aggregate \$175,000 exclusive of the amounts herein and heretofore appropriated. *Provided further*, *That the City of Stockton or the State of California shall first furnish to the United States the right of way for said canal.*" 32 Stats., Part 1, p. 368.

V.

Subsequently thereto, the rights of way having been procured as provided in said act, the Government of the United States began the construction of the canal therein provided for, and later acts of Congress making additional appropriations, the same was completed about 1910 and the channels of the Mormon Slough and the Calaveras River were con-

nected, the course of the canal being southeasterly to northwesterly. Said canal would not have been constructed but for the taking over of the project by the United States.

VI.

Said canal, however, proved to be insufficient to take care of the flood waters of the Mormon Slough and in the spring of 1911 the rains and melting snows from the mountains and hills came down through Mormon Slough and were diverted into and through said canal in such volume and force that the same overflowed and the adjacent lands were submerged for a considerable distance on the north and east of said canal, while the force of the current was such that it broke through the levee on the opposite bank of the Calaveras River (the channel of which was itself insufficient to carry off its own waters and the added waters of said Mormon Slough) and flooded a very considerable area to the north and west of said river. All of said lands were in a high state of cultivation and very valuable.

VII.

The result of said overflow, which has since been recurrent, has been to destroy the growing crops and cover portions of the overflowed region with said gravel, noxious weeds, and other obstructions to cultivation; on other portions to wash away the topsoil completely down to bedrock, rendering the same unfit for cultivation; to demolish and injure the fences,

buildings, fruit trees and vines, and other improvements, and, generally, to do the damage that would naturally ensue upon floods of volume and violence. Beside the direct damage done by the flood of 1911 and subsequent recurrences, the danger and probability of future recurrences of floods have so diminished the value of the lands subject to overflow that they are now worth but a fraction of their former value. Some of the lands when overflowed must be pumped out at great expense and the protective works rebuilt.

* * * * *

IX.

The effect of said construction work by the United States was, and has been, to take the property of the owners and tenants of land within said flooded area, including petitioner, by reason of which petitioner has been damaged in the sum shown by his bill of particulars hereunto annexed. * * *

Such is the statement of plaintiff's claim. It, therefore, appears that before the Government constructed the canal for the benefit of the people of California that the two rivers, the Calaveras and Mormon Slough, had "always been subject to flood stages from the rains and melting snows in the mountains, and the effect of said flood waters was to inundate, or subject to inundation, annually a portion of the city of Stockton."

The statement further shows that while the United States was willing to construct for the benefit of the

people of Stockton and surrounding country a canal to divert the waters, it had no intention to appropriate any property under the right of eminent domain, for it refused to do the engineering work unless the city of Stockton or the State of California appropriated *at their own expense* such land as was necessary for the new channel.

The statement further shows that the canal which the Government constructed upon a right of way acquired by the State of California proved insufficient in the spring of 1911 to take care of the rains and melting snows and that, by reason of the unusual demand thus put upon the canal by such natural causes as the law denominates the "act of God," the lands of the plaintiff and other abutting property owners were temporarily submerged.

It is true that the petition vaguely suggests that the flood, which took place in the spring of 1911 and first caused the overflow of the canal, has recurred in subsequent years, but how "recurrent," to use the phrase of the petition, the flood stages are, the petition does not aver. Whether the subsequent floods were frequent or infrequent, and whether they lasted an hour, a day, or a month, is undisclosed by the petition. In some subsequent years the abnormal flow of water due to the excessive rainfall and melting snows of the spring season did again temporarily overflow the banks of the river, and for a short time submerged the upland, but there is no suggestion that the channel was not ordinarily adequate to

carry off the waters. The proximate cause of the plaintiff's injury was, therefore, abnormal high water due to unusual spring freshets.

Obviously, the plaintiff can not recover simply because the Government may, or may not, have constructed an adequate canal. The United States was under no obligation to construct any canal. The law did not compel it to insure the adequacy of the canal for abnormal conditions, and even if the Government engineers failed to take into account the possibility of unusual spring floods, at worst their lack of foresight could only amount to engineering errors or negligence, and the United States is immune from suit by reason of damages due to such error or even negligence.

I am assuming, *arguendo*, that the engineers were mistaken in constructing this canal in not making due allowance for the extraordinary floods in exceptional years of a mountain region, but I am not conceding, except for purposes of argument, that there was any negligence on the part of the engineers. Indeed, the petition does not charge that the canal was not properly constructed and with a fair regard for the best interests of all concerned. It simply charges that in the spring of 1911 and at some recurrent periods—how frequent or infrequent it fails to say—that the canal, although normally adequate, was unable to cope with exceptional conditions which nature temporarily imposed upon it.

The petition does not suggest that the United States intended to flood the plaintiff's lands. It does not

suggest that the United States intended to take the plaintiff's lands. The only averment which suggests the ground of liability is in Paragraph IX, above quoted, which says:

The *effect of said construction work* by the United States was, and has been, to take the property of the owners and tenants of land within said flooded area.

This, however, is only an averment of a legal conclusion. To give the Court of Claims jurisdiction and to justify a judgment against the Government, it was necessary that the plaintiff should allege that the United States had entered into a contract, whether express or implied, to "take" these lands under the right of eminent domain.

Undoubtedly, when the United States appropriates property for public purposes an implication arises of a contract to pay for the lands thus *intentionally and deliberately* taken.

But the petition does not suggest that the United States thus intended to take plaintiff's land for permanent improvements, but only avers that because a canal proved insufficient to carry off exceptional flood waters "*the effect*" was to "take" the plaintiff's lands.

The law does not justify any such conclusion. Whether the United States has appropriated property for public purposes under the right of eminent domain is in each case a question of fact and must be averred as such.

It is true that the fact may be proved as an inevitable implication of other facts. Where, therefore, it is clear that the United States has *intentionally* and *permanently* taken possession of the lands of a citizen, the implication of a contract to pay for the value is inevitable. But in every such case the implication must result from some act of the Government which in itself is unequivocal and indubitable.

Where, however, the act is due to conditions over which the United States has no control, then there is no ground for the implication, even though the Government in its operations may have been a contributory cause.

It may be that the United States, in assuming the duty of constructing this canal, should have taken into account the possibility of spring floods of unprecedented violence. Its failure to do so may have been due to the mistakes, or even negligence, of its engineers, or it may have been due to the fact that in the judgment of the Government such anticipation of abnormal occurrences of nature would make the cost of the canal prohibitive and that the gratuity of the Government in constructing the canal for the benefit of the people of California did not extend beyond the reasonable provisions for the ordinary requirements of the river.

It does not matter which of these assumptions is correct. Neither of them would constitute a "taking" of the plaintiff's lands or justify an implied contract to pay for damages which might result from a mis-

calculation of the requirements of the canal, or an unwillingness to make provision for unusual conditions.

As the opinion of the Court of Claims well shows, the line of demarcation between incidental damage due to the operations of the Government, whether skillful or negligent on the one hand, and the conscious, deliberate, and unequivocal appropriation of private property for a public purpose on the other hand, is clear and not only affects the right of recovery but even the jurisdiction of the Court to entertain the controversy. Obviously, the immunity of the Government from suit in actions sounding in tort can not be frittered away by the gratuitous fiction that every time the Government by its necessary operations incidentally injures private property, there is thereby a "taking" of such private property and an implied contract to pay.

This distinction being clear, the failure of the petition to allege any deliberate and intentional appropriation by the United States of the plaintiff's property should have been sufficient to dispose of the case, and, presumably, this would have resulted had the Government demurred to the petition instead of entering a traverse.

II.

FINDING OF FACT CONCLUSIVE.

Whatever doubt there may be as to the sufficiency of the petition there can, we submit, be no doubt as to

the justice of the judgment upon the facts as found by the Court of Claims.

From them it appears that the capacity of the natural channels of the Calaveras River "is so limited that during freshets a considerable part of the waters flow across the country, not uniformly distributed but for the most part carried in shallow depressions or swales * * *." (R. 5.)

Finding III states (R. 6):

* * * * *

The Calaveras River was and is a "*rainy weather*" or "wet season" river, supplied by rains exclusively or very nearly so, rising and falling in proportion to the rainfall and dry during a portion of each year, and Mormon Slough possessed much the same characteristics except that after the diversion to it of a part of the waters of the river it carried more water than the river and became practically the main channel. Until about 1862 the low water flow of the Calaveras River was carried in what was known as the Old Calaveras River, none of it passing into Mormon Slough, but after a very high water in 1862 the flow was largely diverted into Mormon Slough.

* * * * *

The territory lying between the Calaveras River and the Mormon Slough had always been subject to flooding to a greater or less extent, caused by breaks in the low levees along the Calaveras and the slough or the overflow of these streams and heavy rainfalls on the

area, and the city of Stockton had been subject to frequent floods, but they were not serious, as most of the flood waters passed to the north of the city, until the Mormon Slough became the principal outlet of the upper Calaveras River and the principal drainage channel for the contiguous watershed. In periods of high water the slough carried large quantities of sediment, and prior to the construction of the diverting canal this sediment was deposited near its mouth and in the Stockton Channel, interfering with navigation and entailing necessary annual expense for dredging, in addition to which the water carried by the slough frequently flooded portions of the city of Stockton.

The nature of the flood which caused the damage for which this suit is brought is thus stated in Finding V (R. 9):

High waters in the Calaveras River section generally occur during January, February, and the earlier part of March, and, to a greater or less degree, dependent on the amount of rainfall, *are of almost annual occurrence*. The waters rise and recede rapidly and flood conditions are frequently of recurrence in the same year during those months.

At the time the diversion canal project was prepared, which was in 1898, several years before its actual construction, there was but little available data as to the flood discharge of the Calaveras River and Mormon Slough. There was no gauge until December, 1906, when a gauge was established by the Weather

Bureau near Jenny Lind on the Calaveras, about 25 miles above the canal, after which daily gauge heights at that point were obtainable, but conditions below were not accurately indicated thereby.

In January, 1911, there were two high waters which were of minor importance except for their effect in leaving the watershed in favorable condition for the heavy subsequent run-off, which, by reason of very heavy rains, came on the 30th and 31st of January, 1911, and was an unprecedented flood, unless the flood of 1862 may have been greater, as tradition has it. The levees on the Old Calaveras River and on the Mormon Slough between Bellota and the canal were broken in several places so that they had little effect in confining the course of the water. Some of it flowed south of Mormon Slough and some north of the Calaveras, but the greater part of that beyond the capacity of the river and slough flowed across the country between the river and the slough. From a large break in the levee above Linden, which is about 4 miles below Bellota, the Linden Road, which is in a natural trough, carried a large volume of water. The waters flowing in the slough in great volume and to its capacity were diverted by the dam into the canal except as to some overflow which passed on toward Stockton, and the large volume of water flowing over the country between the slough and the Calaveras was intercepted by the canal and the aggregate volume turned toward the Calaveras, but the volume was in excess of

the capacity of the canal and also, when combined with the waters in the Calaveras, in excess of the quantity which could find a ready and rapid outlet down that stream, with the result that, by reason of the excess quantity of water reaching the canal and the retarding of its flow by the waters in the Calaveras, and also, to some extent, by the bridges over the canal, the lands above or to the northeastward of the canal and for the full length thereof were overflowed, the overflow extending in varying depths from one-half to 1 mile, according to the contour of the land, the greatest distance and depth occurring in the pocket formed by the canal levee and the levee on the north bank of the Calaveras, where a lake was formed. The waters flowing in and parallel with the canal, moving in greater volume and with greater force than those in the Calaveras, threw the current of the river to the levee on the north bank and backed up the waters of the Calaveras to the northeast. Across the Calaveras River, approximately 500 feet below the mouth of the canal, was a bridge or trestle of the Southern Pacific Railroad, which to some extent obstructed the flow of the waters and contributed to the backing up thereof. A result of the backing up of the waters in the Calaveras and the embanking of them against the levee on the north bank thereof was a break in that levee at a point above and opposite the mouth of the canal and the break was soon enlarged by erosion. On the north of the river below or westward from

this break was an embankment of the Southern Pacific Railroad, containing a 15-foot trestle and two small culverts, and this embankment tended to restrain the waters flowing through this break and also flowing down on the north side of the river and, in a triangular pocket between it and the levee on the north side of the river, another lake was created contiguous to that on the other side above the canal. Low-lying lands, extending for a considerable distance north of the river and for some considerable distance both above and below this break in the Calaveras levee, were flooded, but the waters flowing through the break were not the only cause thereof. Waters flowing down the north side of the river from breaks above and in waterways on that side thereof contributed thereto. The proportionate contribution from either source does not appear and is speculative.

The years 1912 and 1913 were comparatively dry years and there were no high waters of consequence, but in 1914, 1915, 1916, and 1917 there were floods which to a greater or less extent inundated the lands northeast of the canal. By reason of the filling of the canal by deposits during successive floods a less volume of water caused a flooding of these lands. In 1914, when the highest water after 1911 occurred, it attained a height on these lands within 1 foot of that of 1911, and in this year the flood again broke through the levee on the north side of the Calaveras which had been in some manner repaired after the flood of 1911.

The duration of flooded conditions on these lands varied, dependent on the duration of the rains causing them and the time necessary for the accumulated waters to find their way down the Calaveras. Sometimes floods *ran off in a few hours*. In 1911 flood conditions lasted for two days. At times in later years as one flood ran off a recurrence of heavy rains caused a recurrence of flood conditions. The rapid run off of floods immediately cleared these lands of water except as to low places having no outlet, where the water remained in pools until absorbed by the earth.

During the flood of 1911 a large quantity of water flowing over the area between the Calaveras River and Mormon Slough flowed onto the lands northeast of the canal and would have flowed thereon if the canal had not been constructed. *To what extent these waters in 1911 would have accumulated on, flooded, or damaged these lands but for the canal does not specifically appear and is speculative.*

I call attention to the portion of this Finding last italicized, for it thus appears that the plaintiff failed to satisfy the Court of Claims that if the Government canal had never been constructed the almost unprecedented flood of 1911 would have had any different result.

As to the special damage done to the plaintiff's land the findings are (R. 18, 19):

The flood of January 30-31, 1911, covered both of these tracts to an approximate depth

of from $2\frac{1}{2}$ to $4\frac{1}{2}$ feet with some slightly greater depth over a few low places. The water immediately surrounding the residence attained a depth of near $3\frac{1}{2}$ feet, or approximately $2\frac{1}{2}$ feet below the main or first floor, and flooded the basement or cellar. As the flood increased, the water moved in the canal with considerable rapidity, and for a time flowed over a part of the land, particularly that in and toward the pocket, with a rather strong current, but when the coming together of the waters in the canal and river had so augmented the volume that it could not find a ready outlet and began to back up in the river the water over these lands became sluggish and moved with but little current. *This flood continued for about two days*, but what its varying stages during that period were, except the maximum as stated, is not shown.

At the residence the front steps to the veranda were washed away. It is not satisfactorily shown that the house was otherwise damaged or rendered in any wise uninhabitable or unsafe for occupancy. It was in good condition inside and out after this and subsequent floods. Stefano Sanguinetti lived in this house during this flood and continued to live there until some months after the flood of 1914, when he moved to Stockton. It is asserted that he was "driven out by the floods." It does not appear that there was any reason why he might not have continued in the occupancy of the house except the inconvenience entailed during the brief periods

when it was surrounded by water. One of his sons was farming the land during 1911 and subsequently as a tenant. The amount of actual damage to the house by the flood of 1911 is not shown, *but it was negligible*. It was not materially depreciated in value by that flood. It was depreciated in value by that flood in conjunction with floods of subsequent years, indicating a continuing danger of recurrence of floods in flood seasons and consequent inconvenience. That depreciation was 25 per cent of its value.

* * * * *

*None of this land was permanently overflowed nor was it overflowed for such length of time, either in 1911 or subsequent thereto, as to prevent its use for agricultural, horticultural, or orcharding purposes. It has been cultivated and the products of the orchard marketed each year since the flood of 1911, and there have been recurrent floods of greater or less magnitude each year except the dry years of 1912 and 1913. * * **

As to whether or not the United States intended to "take" the plaintiff's property in the manner described the Court of Claims found as follows (R. 12):

VIII.

It is not shown either directly or inferentially that the United States or any of its officers acting for or in their behalf, in the preparation of the plans for the diverting canal or in its construction had any intention to thereby flood any of the lands here in-

volved or had any reason to expect or anticipate that such results would follow. The fact that the canal was of insufficient capacity to care for the waters coming down Mormon Slough augmented by the waters flowing to it over the area between the slough and the river, during periods of very heavy rains and extremely high water, was an engineering mistake due to lack of accurate information as to the conditions to be met during such periods. The engineers of the United States who made the preliminary examination and recommended the plan reached the conclusion based on such information as they had, that the canal as proposed would have a greater capacity than would be required for the expected volume of water to be carried and that the Calaveras River below the mouth of the canal, when dredged as recommended, would have a capacity considerably in excess of the combined volume of water to be carried by it. The canal was constructed as recommended by the Government engineers. Work was done on the Calaveras below the mouth of the canal both by dredging and by depositing the dredged materials on the levees on the north side, but whether this part of the work was completed as recommended does not satisfactorily appear.

I submit that this finding of fact on the fundamental question of the implied contract is conclusive of this controversy. It expressly negatives the suggestion that when the United States constructed this canal, it anticipated the canal's incapacity to prevent

the flooding of adjoining lands under unusual conditions. Assuming that it was the duty of the United States to anticipate extraordinary conditions and unprecedented spring freshets, the failure to construct a canal sufficient for any possible contingency was a mistake of the United States Army engineers. It is unimportant whether the mistake was excusable or inexcusable, but the finding indicates that the mistake was excusable, as the engineers did not have sufficient data to determine what the requirements of the canal should be to meet such unprecedented rainfall as happened in 1862 and 1911.

III.

THE AUTHORITIES.

Under these circumstances and with this express negation as a finding of fact of any "taking" by the United States Government, it hardly seems necessary to review the authorities on the subject of what is a "taking" within the meaning of the Constitution. The Court of Claims thoroughly examines and reviews the preceding decisions of this Court and its careful discussion makes any further discussion of the authorities in this brief somewhat superfluous.

The two cases which come nearest to supporting the plaintiff's claim are the cases of *United States v. Lynah*, 188 U. S. 445, and *United States v. Cress*, 243 U. S. 316.

In the first of these cases this Court, by a bare majority of one, held that where the Government

constructed an embankment along a navigable river, whose *direct, immediate, and necessary* effect was to cause a *permanent* overflow of the plaintiff's lands, that it was a "taking" within the Fifth Amendment of the Constitution.

Unquestionably the Government may manifest its purpose to appropriate property by its acts as well as by its words. For example, if the Government desired to tear down a building and it was obviously necessary to use the adjoining land for the *débris*, it would not matter whether the Government first appropriated the adjoining land by formal proceedings and then tore down its building, or whether it first tore down its building and covered the adjoining land with the *débris*. In either case the formal verbal avowal of an intention to appropriate, or the direct appropriation by the necessary results of unequivocal acts, amounts to the same thing. It was obvious that in the *Lynah case*, the *direct, certain, immediate, and necessary result* of the construction of the embankment was the overflow of Lynah's land. And, from the essential nature of the act, this court drew the reasonable inference that the Government intended to overflow Lynah's lands, and thus to appropriate them. There was a direct connection between the Government's operations and the claimant's lands, both with respect to space and time.

In the cases at bar, however, all these elements are absent. It can not be said that, when the Gov-

ernment undertook to construct this canal, the overflow of plaintiffs' land was so direct, immediate, and inevitable as to suggest a conscious and deliberate appropriation by the Government. In a word, the distinction which must exist between these cases of a true "taking," on the one hand, and the indirect and unascertainable consequences of a lawful act on the other must lie in an intention to take, whether that intention be expressed or implied.

There must be an intention on the part of the United States, either expressed or implied, to take the property of another before there can be any implied promise to pay or contract liability incurred. This liability may be inferred where the results naturally and indubitably flow from the act or effect of the act and may be definitely ascertained or determined.

The case of *United States v. Cress*, 243 U. S. 316, 327, upon which the plaintiff will, I assume, chiefly rely, is also plainly distinguishable. Unfortunately the trial court did not state in its opinion the facts of the case in any detail. The findings were very meager. The Supreme Court interpreted the findings as showing "that this is not a case of *temporary* flooding or of consequential injury, but a *permanent* condition, resulting from the erection of the lock and dam, by which the land is 'subject to frequent overflows of water from the river.'"

The Court of Claims in its opinion in the instant case well points out that in the *Cress* case the Court

was considering "the effect of backwater caused by the dam in the performance of its usual and intended functions." The Court of Claims suggests that in the *Cress case* a movable dam may have been under consideration, and that the overflow of the adjoining lands therefore occurred at the volition of the Government in regulating the use of the dam. For this reason, and as the adjoining land was submerged whenever the Government desired by its presumably movable dam to create a back pool of water, this Court held that there was an intention on the part of the Government to subject the adjoining lands to an easement of occasional submergence.

I submit that this is the true interpretation of the *Cress case*; certainly the opinion of this court in that case does not justify an inference that the submergence of lands, the proximate cause of which was an act of nature and not of the United States, would constitute a "taking" by the Government. In such a case the elemental forces of nature temporarily take the plaintiff's lands and not the United States, although the inadequacy of the Government's public works may have been *incidentally* contributory to the injury.

Without further considering the authorities, which have been so ably reviewed by the Court of Claims, let me only refer to two very recent cases, decided by the Supreme Court since the Court of Claims dismissed the plaintiff's petition in the instant case. These two decisions are the latest expressions by this

Court of the law of the case and both sustain the Government's contention.

The first of these cases is *Horstmann Co. v. United States*, 257 U. S. 138. In that case the United States undertook an irrigation project under which it constructed dams, canals, and other structures to distribute water to various tracts of land in the Carson River Valley district. The plaintiff had a soda plant upon a crater lake which was several miles distant from the Government dams and canals. As soon as the Government works were in operation the water of the Soda Lake steadily rose until it had completely submerged and permanently destroyed the plaintiff's soda plant. The plaintiff contended that this was due to seepage from the waters of the Government canal, and while the Government disputed this, this Court assumed as a fact that the Government irrigation project had caused the rise in the water of the lake and the destruction of plaintiff's property.

Here, then, two significant facts were the basis of the judgment: (1) That the submergence of the plaintiff's property was wholly and exclusively due to the Government's irrigation project, and (2) that the plaintiff's property had been wholly and permanently taken by this submergence.

This Court, after saying that "it would border on the extreme to say that the Government *intended* a taking by that which no human knowledge could even predict," added (p. 146):

Any other conclusion would deter from useful enterprises on account of a dread of incurring unforeseen and immeasurable liability. This comment is of especial pertinence. That the result of the Government's work to the properties of plaintiffs could not have been foreseen or foretold is a necessary deduction from the findings of the Court of Claims. The court found that there is obscurity in the movement of percolating waters, and that there was no evidence to remove it in the present case, and necessarily there could not have been foresight of their destination nor purpose to appropriate the properties.

The pertinency of this reasoning to the present case is that under Finding VIII, quoted *ante* p. 18, it appears that the United States engineers in the instant case, as in the *Horstmann case*, never anticipated that the character of their work would result in any flooding of adjoining lands. The instant case is stronger than the *Horstmann case* because in the latter case the flooding was wholly due to seepage from the Government's canal, whereas in the instant case the Government's canal was only contributory in the sense that it was not adequate to meet the contingency of an extraordinary freshet.

The most recent case of this character is *Kcokek Bridge Co. v. United States*, 260 U. S. 125, decided November 13, 1922. In that case the United States was deepening a channel of the Mississippi River and in blasting the rock at the bottom of the river with

dynamite it caused waves to submerge and partly destroy the pier of plaintiff's bridge. This Court said:

However small the damage, it may be true that *deliberate* action in some cases might generate the same claim as other forms of *deliberate* withdrawal of property from the admitted owner. *United States v. Cress*, 243 U. S. 316, 329. But without considering how the line would be drawn when such action took place in the improvement of navigation, it is enough to say that this is *an ordinary case of incidental damage* which if inflicted by a private individual might be a tort but which could be nothing else. In such cases there is no remedy against the United States. See *Bedford v. United States*, 192 U. S. 217, 224.

Applying this reason to the instant case, it may be true that if the United States deliberately intended to submerge the plaintiff's lands by the construction of the canal in question that recovery might be had; but as the findings negative any such intention, and as the normal and ordinary conditions of the canal are quite inconsistent with any such intention, the instant case, as the *Keokuk Bridge case*, presents "an ordinary case of incidental damage which, if inflicted by a private individual, might be a tort, but which could be nothing else."

IV.

CONCLUSION.

I have probably argued the case at undue length, but as it is one of a group and involves a substantial sum of money, it seemed best to present the Govern-

ment's views, even though the able opinion of the Court of Claims had made any further argument superfluous.

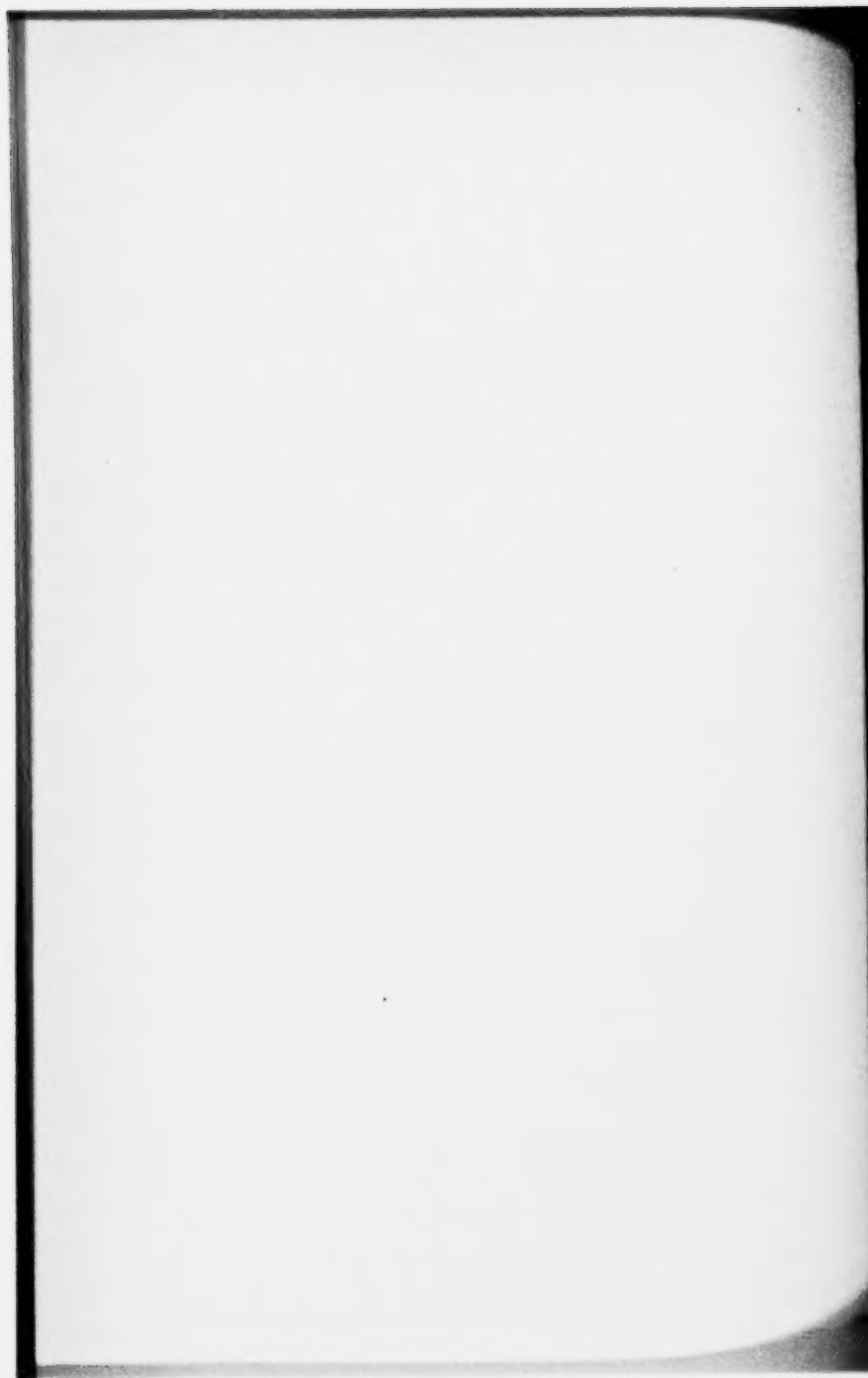
I submit it is important that this Court should maintain the clear line which separates the deliberate appropriation of private property for public uses from the cases where the Government in its operations, with or without due care, inflicts some incidental damage upon a private citizen.

It may be true that morality requires that the Government should be as responsible for the consequences of its torts as an individual. Such, however, is not the law, and the immunity of the Government from suits in tort should not be impaired or frittered away by a too generous fiction of a "taking" which no one ever contemplated.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.





W. S. STARK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

No. 130.

STEFANO SANGUINETTI, APPELLANT,

vs.

THE UNITED STATES.

**Motion of Appellant For Remand to Court
of Claims.**

BENJAMIN CARTER,
Attorney for Appellant.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

No. 130.

STEFANO SANGUINETTI, APPELLANT,

vs.

THE UNITED STATES.

**Motion of Appellant For Remand to Court
of Claims.**

1. Appellant respectfully refers the court to a brief filed on its behalf in this case and to comments therein, at pages 20 to 23, on parts of the findings of fact made by the Court of Claims in regard to the expectation and purpose of the responsible engineers of the United States Army when they put into the plan of the improvement in question a levee, bordering a diverting canal, and it says:

The record of this case at the Court of Claims does not include any evidence regarding the function to be performed by said levee. The only evidence in existence on this question is contained in various reports of said engineers, some of which are copied or cited in said brief. Those evidences are entirely harmonious and are contradictory of said findings. After the case was decided by the Court of Claims and said findings of fact filed, a motion was filed by the claimant quoting some of said reports and asking that they be included

in the findings, but said motion was overruled by the court, and therefore there was no evidence to support the finding made, and, as said brief shows, the finding is in conflict with the facts and with the real evidence which might have been considered.

Said portion of the findings and said motion filed at the Court of Claims for insertions therein are appended hereto as, respectively, "Exhibit A" and "Exhibit B."

Claimant moves that the case be remanded by this court to the Court of Claims with directions to report to this court, by amendment of the findings of fact or otherwise as this court may determine, whether there was any evidence before it, not contained in any of the engineering reports, regarding the functions which said army engineers, in designing and constructing said improvement, expected and intended that the levee would, or might, perform.

2. Claimant refers the court to the petition (Record, pages 1 to 4), to comments made thereon in the findings of fact (Rec., page 20) and in said brief filed herein for appellant (page 23), and it says:

Defendant's brief was filed, and the case closed for the making of proof, on May 13, 1919. On October 9 following a motion was filed by defendant to reopen the case for the taking of additional proof. Said motion was overruled by the court on November 10 following and an order made setting the case for hearing "the first week in December." The case was called by the Court of Claims for trial on December 3 following. The attorney having the prosecution of the case in charge asked for a continuance and showed that the case could not have been, and was not, ready for hearing at that time, (a) because the claimant of record, Stefano Sanguinetti, had died since the petition was filed, and there had been no substitution of a claimant. (b) because amendment of the petition was necessary

for the introduction of competent matters which had been developed in the taking of proof, and (c) because a brief, in reply to that filed for defendant, seemed to be necessary but could not be drawn aptly until the matter of reopening the case had been decided and that since the ruling of the court regarding said reopening there had not been time. The court overruled said request for continuance and compelled that the case be argued and submitted, and it was argued and submitted, forthwith. Before said argument an amended petition had been prepared provisionally in the names of Geromina Sanguinetti and others, as heirs of said Stefano Sanguinetti, and at the hearing the court was informed of this fact and, in the expectation of claimant's counsel that the court, in deciding or otherwise acting upon the case, would either permit or forbid the filing of said petition, it was put into the hands of the court with the papers already filed; but the court did not make any order regarding said proposed petition. A motion of said heirs, to amend findings and set aside judgment having first been filed, argued, submitted and overruled, said heirs, on May 28 following, presented for filing a motion for leave to amend the petition, by substituting said provisional petition previously presented and, to that end, to set aside the previous submission of the case, and on June 7 following the same was overruled by the court. Appellant, Jeromina Sanguinetti had been appointed and qualified as administratrix *de bonis non* of the estate of said Stefano Sanguinetti. On November 22 following, said heirs filed in this court a petition for a writ of mandamus to the Court of Claims requiring it to permit the filing by them of a petition; which petition was denied by this court. On December 4 following said Jeromina Sanguinetti, as such administratrix, filed a motion at the Court of Claims for substitution as claimant and

by an order of the court on December 13 following this substitution was made. On February 14, 1921, said Jeromina Sanguinetti filed motions in said court to set aside the judgment entered on February 16, 1920, and asking leave to file her petition. These motions, in all respects, were denied by the court the same day.

When Stefano Sanguinetti was dead, and it became necessary to substitute a claimant, or claimants, counsel for the interested parties deliberated and reached the conclusion that the heirs, rather than an administrator *de bonis non*, would be the proper parties. The court having ignored the new petition, drawn in the name of the heirs, it became necessary to obtain a direct and final decision on this question of parties, and this was the purpose, as explained to this court, of the petition of November 22 for a writ to require recognition by the Court of Claims of the heirs as claimants. If the question had not been adjudicated in *limine* and the wrong claimant, or claimants, had been introduced and prosecuted a claim to final decision, the six years limitation on the jurisdiction of the Court of Claims might well have run against the introduction of the proper claimant.

Many times, in recent years, upon a reference by Congress, or one house or a committee thereof, of a claim of an "estate," when it transpired that there had been a full administration, and the executor or administrator discharged, the heirs had been recognized by the Court of Claims as the proper claimants. In this case, moreover, the laws of the State of California, where any moneys recovered would go for distribution, seem to point to the heirs as the proper parties for any legal proceedings. These statutes seemed to cover any case where, an executor or original administrator being sued on some outstanding claim after he had distributed all the assets of the estate, could have sustained a *res judicata*

of *plene administravit*; and explicit provision was made for devolution upon the heirs, after administration, of any subsisting debts of the estate. Such a debt is the judgment rendered by the Court of Claims in this case against the decedent for costs. (Civil Code of California, Deering, Sec. 1408).

As for the administratrix *de bonis non*, it is evident that she had had no day in court for any purpose until December 13, 1920, when the court allowed her substitution as claimant, to take effect as of December 4. Her first step, taken on February 14 following, was to attempt to file her petition. This latter, if admitted, would have supplied those omissions in the body of the petition to which the Court of Claims had adverted.

It seems due to this administratrix either (1) that the court treat the original petition as stating all of those facts upon which the findings of the Court of Claims and the arguments of counsel in this court have been based or (2) that there be on file a petition which would support a judgment in favor of the administratrix if the court takes her view of the law and the facts.

Attached hereto, by the names stated, are the following, which will prove the acts of the parties and of the Court of Claims here stated: "Exhibit C," all docket entries of the Court of Claims in the case; "Exhibit D," motion of claimant to set aside judgment and admit new pleadings.

Appellant moves that, unless the court regards the petition of Stefano Sanguinetti as sufficient for review of the questions of fact presented by the briefs, it will remand the case to the Court of Claims with directions to permit the filing by the administratrix *de bonis non* of such a petition, in form and in substance, as by law she would have been entitled to file when substituted as claimant.

BENJAMIN CARTER,
Attorney for Appellant.

EXHIBIT A.—*Paragraph VIII of Findings of Fact.*

It is not shown either directly or inferentially that the United States or any of its officers acting for or in their behalf, in the preparation of the plans for the diverting canal or in its construction had any intention to thereby flood any of the lands here involved or had any reason to expect or anticipate that such results would follow. The fact that the canal was of insufficient capacity to care for the waters coming down Mormon Slough augmented by the waters flowing to it over the area between the slough and the river, during periods of very heavy rains and extremely high water, was an engineering mistake due to lack of accurate information as to the conditions to be met during such periods. The engineers of the United States who made the preliminary examination and recommended the plan reached the conclusion, based on such information as they had, that the canal as proposed would have a greater capacity than would be required for the expected volume of water to be carried and that the Calaveras River below the mouth of the canal, when dredged as recommended, would have a capacity considerably in excess of the combined volume of water to be carried by it. The canal was constructed as recommended by the Government engineers. Work was done on the Calaveras below the mouth of the canal both by dredging and by depositing the dredged materials on the levees on the north side, but whether this part of the work was completed as recommended does not satisfactorily appear.

EXHIBIT B.

IN THE COURT OF CLAIMS.

No. 32914.

JEROMINA SANGUINETTI, AS ADMINISTRATRIX *DE BONIS NON* OF THE ESTATE OF STEFANO SANGUINETTI.

vs.

THE UNITED STATES.

Motion of Claimant to Amend Findings of Fact.

Claimant, referring to the findings of fact which were filed in this case on February 16, 1920, and which were adopted again after the substitution of claimant in the stead of his decedent, Stefano Sanguinetti, moves that paragraph IV only of said findings be amended, as follows:

(1) *At the end of second paragraph, on page 4, insert:*

"The project also included a levee to be constructed along the south bank of the canal for control of waters overflowing the canal."

(Report of Chief of Engineers for 1899, Pt. 4, pp. 3191-3193; Rec., pp. 66, 67, 68.)

(2) *Last paragraph of finding, page 5.*

"In adopting the plan for this work it was contemplated that the waters flowing over this area which otherwise would have continued on toward Stockton should be intercepted by the canal and thus diverted to the Calaveras River."

After "canal" insert "and the levee on the south bank thereof."

BRIEF.

Unquestionably the project out of which this suit grew provided for a levee on the south side of the diverting canal, so placed and of such dimensions as, in case of floods exceeding the capacity of the canal, to hold the excess waters back, causing them to overflow lands north of the canal, until they could find their way to the Calaveras River. The canal then was an integral part of the project; and any flooding of lands attributable to it was foreseen, was intended indeed, by the engineers when they framed the project. That the project had any such features would not be inferred from the findings as they stand. On the contrary the Supreme Court, on appeal, would naturally take the impression that the project included only (1) the canal, (2) the highway bridges and (3) dredging and levee-building in and along the bank of the Calaveras River. This conclusion might well work a fatal injury to claimant, seeing that the levee bordering the diverting canal was the real agent by which the lands of claimants' decedent were flooded.

It is true that the engineering reports, known judicially to the Supreme Court, contain an ample description of the project and thus show the function of the levee in question. But after all these reports are evidence merely; and the Supreme Court might well assume that they had been considered by this court and that there was other contradictory evidence, of greater weight, which brought this court to the conclusion that the levee was *not* an integral feature of the project.

BENJ. CARTER,

Attorney for Claimant.

Filed Feb. 14, 1921.

A true copy:

Test this November 9, 1923.

F. C. KLEINSCHMIDT,

Assistant Clerk, Court of Claims.

EXHIBIT C.—Docket Entries of Court of Claims.

(1)

IN THE
COURT OF CLAIMS OF THE UNITED STATES.

STEFANO SANGUINETTI

vs.

THE UNITED STATES.

No. 32914.

BENJ. CARTER,

Attorney of Record.

F. CARTER POPE,

Of Counsel.

Aug. 18, 1914. Petition and power of attorney filed. Copies (3) pet. and notice to defendants. Testimony ordered. Amount claimed \$56,000.00.

Mar. 2, 1915. Depns. of Silva Sanguinetti and Stefano Sanguinetti for claimant filed. Parties notified.

Mar. 2, 1915. See Case 32893 for claimant's exhibits No. 8 and No. 9.

July 17, 1916. See case 31191 for joint motion of parties to consolidate.

July 17, 1916. See case 31191 for stipulation for introduction of certain evidence.

July 24, 1916. See case 31191 for action of court on motion to consolidate.

Sept. 24, 1917. See case 31191 for depositions of F. F. Lyons, Frank Stark with exhibits attached for defendants and claimants.

Oct. 11, 1917. See case 32912 for exhibits to depositions filed this day in case 32912.

Nov. 13, 1917. See case 31191 for exhibits to depositions filed Sept. 24, 1917.

May 13, 1918. Case placed on trial calendar by

the court and set for trial Nov. 12, 1918. Claimant's brief to be filed by Oct. 5, 1918.

Nov. 12, 1918. Continued, February Call. Claimant's brief to be filed Dec. 15, 1918.

March 10, 1919. Claimant's brief to be filed by March 25, 1919.

March 31, 1919. Claimant's brief to be filed by April 15, 1919.

April 15, 1919. Claimant's request for findings of fact and brief filed. Copies (5) and notice to defendants.

May 21, 1919. Defendant's objections to plaintiff's proposed findings of fact, and request for findings of fact and brief filed. Copies (10) and notice to defendants. (Walker.)

Oct. 9, 1919. See case No. 31191 for defendants motion to remand for the purpose of taking further evidence filed.

Oct. 15, 1919. See case 31191 for affidavit of Philip G. Walker as to taking testimony for defendants filed.

Nov. 5, 1919. See case 31191 for defendant's memorandum in support of motion to remand case for the purpose of taking further evidence filed.

Nov. 10, 1919. Defendants motion to remand (filed Oct. 9, 1919) overruled. Case continued and set for trial for first week in December.

Dec. 3, 1919. Argued and submitted on merits.

Dec. 18, 1919. Claimant's motion for leave to file reply brief filed in open court. Copy to defendants.

Dec. 19, 1919. Claimant's motion for leave to file reply brief allowed. See note.

Dec. 22, 1919. Claimant's reply brief (typewritten) filed. Copy and notice to defendants.

Feb. 16, 1920. Court filed findings of fact and conclusion of law dismissing petition. Judgment against plaintiff for cost of printing of record in the sum of \$234.77. Opinion by Judge Downey.

April 16, 1920. Claimant's motion to amend findings of fact and to set aside judgment filed. Copy and notice to defendants.

May 3, 1920. Claimant's motion to amend findings and to set aside judgment, to the law calendar and set for Monday, May 24, 1920.

May 24, 1920. Defendant's objections to plaintiff's

motion to amend findings of fact, set aside judgment, and grant a new trial filed. Copy to claimant's attorney.

May 24, 1920. Claimant's motion to amend findings of fact and to set aside judgment argued and submitted.

June 1, 1920. Claimant's motion to amend findings of fact and to set aside judgment overruled.

June 7, 1920. Claimant's motion for leave to file amendment to the petition and to set aside submission in this case and cases Nos. 32913 and 32901 (presented for filing May 28, 1920) overruled this day.

June 14, 1920. Motion of heirs of claimant for leave to file motion for setting aside judgment overruling motion filed and submitted in open court. Defts. notified.

June 21, 1920. Motion of heirs for leave to file motion to set aside overruling of motion for new trial overruled.

Dec. 4, 1920. Motion of Jeromina Sanguinetti Administratrix, de bonis non of Stefano Sanguinetti deceased, to be substituted claimant, with certified copy of Letters of Administration and power of attorney filed. Copy and notice to defendants.

Dec. 13, 1920. Court filed an order allowing plaintiff's motion to substitute Administratrix, etc. See Order.

Feb. 14, 1921. Plaintiff's motion to set aside judgment and to admit new pleadings, and motion to amend findings, and motion to file new petition (presented for filing Feb. 10, 1921). Allowed to be received and filed, and considering them as filed the court overruled each of said several motions. (See order filed.)

May 4, 1921. Claimant's application for appeal (filed May 4, 1921) allowed in open court.

Oct. 4, 1921. Record on appeal delivered to attorney of record.

I, F. C. Kleinschmidt, Assistant Clerk, Court of Claims, do hereby certify that the foregoing entries are true copies of all the docket entries in the above entitled case.

(Seal.)

A true copy. Test:

This 8th day of November, 1923.

F. C. KLEINSCHMIDT,

Assistant Clerk, Court of Claims.

EXHIBIT D.**IN THE COURT OF CLAIMS.****No. 32914.****JEROMINA SANGUINETTI, AS ADMINISTRA-
TRIX DE BONIS NON OF THE ESTATE
OF STEFANO SANGUINETTI***vs.***THE UNITED STATES.****Motion to Set Aside Judgment and to Admit New
Pleadings.**

Petitioner moves the court that its judgment entered on the 13th day of December, 1920, upon her substitution as claimant, by which this suit was dismissed, will temporarily be set aside and that she may then have leave to file her petition and her request for amendment of the findings of fact, both of which are presented herewith.

Memorandum.

This motion does not contemplate any further resistance to the dismissal of the suit. Its only purpose is to substitute an adequate petition and to accomplish the few amendments of the findings of fact which claimant regards as of vital importance. These amendments being accomplished, claimant will not seek to delay further the final determination of the case by argument or any other steps. It is anticipated that, upon the filing of the papers now presented and the court's action upon the request for amendments of the findings, the adverse judgment will be entered anew; but then the case will be in condition for appeal without jeopardizing any interest of claimant.

The proposed new petition is in substance the same as that which the heirs of claimant's decedent, both before and after the judgment, vainly attempted to file. It sets up the facts (1) that the project in question

was designed and performed for improvement in navigation and (2) that the levee, on the south side of the canal, was an integral part of the project, designed to control such flood waters as should exceed the capacity of the canal. Without these ~~amendments~~ the sufficiency of the pleading might well be questioned.

A separate short brief, regarding the designed amendments of the findings, is appended to the motion in that regard.

BENJ. CARTER,
Attorney for Claimant.

Filed Feb. 14, 1921.

A true copy:

Test this November 10, 1923.

F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

SANGUINETTI v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 130. Argued January 3, 1924.—Decided February 18, 1924.

A canal, constructed by the Government to improve navigation, overflowed intermittently, flooding the claimant's land but not ousting him from his customary user, except for brief periods, or inflicting permanent injury; and it did not appear either that the flooding was intended or anticipated by the Government or its officers, or that it was attributable directly, in whole or in part, to the improvement, rather than to natural conditions. *Held*, that no taking could be implied, and the United States was not liable *ex contractu*. P. 148.

55 Ct. Clms. 107, affirmed.

APPEAL from a judgment of the Court of Claims dismissing a petition.

Mr. Benjamin Carter, with whom *Mr. F. Carter Pope* was on the brief, for appellant.

Mr. Solicitor General Beck appeared for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The main portion of the City of Stockton, California, and the adjacent territory lie between the Calaveras river and the Mormon slough, both flowing in a general south-westerly direction. The streams are several miles apart and the intervening area, including appellant's land, has always been subject to inundation by overflow therefrom, as well as by reason of periodic heavy rainfall. During periods of high water sediment was deposited in large quantities in the navigable channel, interfering with navigation and entailing annual expenditures for dredging.

In view of this condition, Congress, in 1902, authorized the construction above the city of a connecting canal, by means of which the waters of Mormon slough were diverted into the Calaveras river. Act of June 13, 1902, c. 1079, 32 Stat. 368. The canal was constructed in accordance with plans prepared by government engineers, after investigation, upon a right of way procured by the State of California and conveyed to the United States. A diversion dam was placed in the slough, immediately below the intake of the canal. The excavated material was put on the lower side of the canal, making a levee, of which the dam was practically a continuation; but that this was not done with a view of casting flood waters upon the upper lands is apparent, since the engineers believed the capacity of the canal would prove sufficient under all circumstances. It was evidently the most convenient method of disposing of the material and also it may have contributed to strengthen the lower bank against erosion. The canal was completed in 1910. In January, 1911, there was a flood of unprecedented severity, and there were recurrent floods of less magnitude in subsequent years, except in 1912 and 1913. The capacity of the canal proved insufficient to carry away the flood waters, which overflowed the lands of appellant, lying above the canal, damaging and destroying crops and trees and injuring to some extent the land itself. Appellant brought suit against the Government to recover damages upon the alleged theory of a taking of the property thus overflowed. The land would have been flooded if the canal had not been constructed but to what extent does not appear. None of the land of appellant was permanently flooded, nor was it overflowed for such a length of time in any year as to prevent its use for agricultural purposes. It was not shown, either directly or inferentially, that the Government or any of its officers, in the preparation of the plans or in the construction of the canal, had any intention to thereby flood any of the

land here involved or had any reason to expect that such result would follow. That the carrying capacity of the canal was insufficient during periods of very heavy rains and extremely high water was due to lack of accurate information in respect of the conditions to be met at such times. The engineers who made the examination and recommended the plans, determined, upon the information which they had, that the canal would have a capacity considerably in excess of the requirements in this respect.

The Court of Claims concluded that none of the land here involved had been taken, within the meaning of the Fifth Amendment to the Constitution, and that, therefore, no recovery could be had upon the theory of an implied contract; but that the liability sought to be enforced was one sounding in tort, of which the court had no jurisdiction. Accordingly, the petition was dismissed.

Beginning with *Pumpelly v. Green Bay Co.*, 13 Wall. 166, this Court has had frequent occasion to consider the question now presented. In that case, by authority of the State of Wisconsin, a dam was constructed across the Fox river, which had the effect of raising the ordinary water level and overflowing plaintiff's land continuously from the time of the completion of the dam in 1861 to the beginning of the action in 1867, resulting in an almost complete destruction of the value of the property. It was held that this constituted a taking in the constitutional sense, and the rule was laid down (p. 181) "that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking."

In *United States v. Lynah*, 188 U. S. 445, a dam had been constructed by the United States in such manner as to hinder the natural flow of a stream and, as a necessary result, to raise the level of its waters and overflow the land of plaintiff to such an extent as to cause a total

destruction of its value. It was impossible to remove this overflow of water and the property, in consequence, had become an irreclaimable bog, unfit for any agricultural use. It was held that the property had been taken and that the Government was liable for just compensation, upon payment of which the title and right of possession would pass.

In *United States v. Cress*, 243 U. S. 316, the Government by means of a lock and dam, had raised the water of the Cumberland river above its natural level, so that lands not normally invaded were subjected permanently to frequent overflows, impairing them to the extent of one-half their value. A like improvement had raised the waters of the Kentucky river in the same manner so as to end the usefulness of a mill by destroying the head of water necessary to run it. The findings made it plain that it was not a case of temporary overflow or of consequential injury but a condition of "permanent liability to intermittent but inevitably recurring overflows" and it was held that such overflowing was a direct invasion, amounting to a taking.

Under these decisions and those hereafter cited, in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property. These conditions are not met in the present case. Prior to the construction of the canal the land had been subject to the same periodical overflow. If the amount or severity thereof was increased by reason of the canal, the extent of the increase is purely conjectural. Appellant was not ousted nor was his customary use of the land prevented, unless for short periods of time. If there was any permanent impairment of value, the extent of it does not appear. It was not shown that the overflow was the

direct or necessary result of the structure; nor that it was within the contemplation of or reasonably to be anticipated by the Government. If the case were one against a private individual, his liability, if any, would be in tort. There is no remedy in such case against the United States. *Keokuk Bridge Co. v. United States*, 260 U. S. 125.

The most that can be said is that there was probably some increased flooding due to the canal and that a greater injury may have resulted than otherwise would have been the case. But this and all other matters aside, the injury was in its nature indirect and consequential, for which no implied obligation on the part of the Government can arise. See *Gibson v. United States*, 166 U. S. 269; *Bedford v. United States*, 192 U. S. 217; *Transportation Co. v. Chicago*, 99 U. S. 635; *Jackson v. United States*, 230 U. S. 1; *Horstmann Co. v. United States*, 257 U. S. 138; *Coleman v. United States*, 181 Fed. 599.

The judgment of the Court of Claims is

Affirmed.
